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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CONTINENTAL TREND RESOURCES, INC., *et al.*,
Petitioners,

v.

OXY USA INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal appellate court's *de novo* review of a punitive damage award for excessiveness violates the holding of *Gasperini v. Center of Humanities, Inc.*, 116 S.Ct. 2211 (1996) ("*Gasperini*") and the reexamination clause of the Seventh Amendment.

   a. Whether the Seventh Amendment prohibits a federal appellate court from relying on evidence never presented to the jury in ordering a remittitur.

   b. Whether the Seventh Amendment prohibits a federal appellate court from reducing an award of punitive damages below the maximum amount permitted by applicable law.

2. Whether the Court of Appeals' mandate that the maximum mathematical ratio of compensatory to punitive damages is 10 to 1 in a commercial injury case violates this Court's decision in *BMW of North America, Inc. v. Gore*, 116 S.Ct. 1589 (1996) ("*BMW*") and its predecessors and Petitioners' right to due process.

   a. Whether the Court of Appeals' holding that a defendant's profit incentive and the potential harm to victims other than the plaintiff are irrelevant in applying the ratio guidepost, violates this Court's holdings in *BMW* and its predecessors.

LIST OF PARTIES

In the proceeding before the Court of Appeals, the parties were Continental Trend Resources, Inc., Harold G. Hamm, Trustee of the Harold G. Hamm Revocable Inter Vivos Trust, Gary H. Wright, Cindy Wright, Jeffrey B. Hume, Farrar Oil Company, OXY USA Inc., and Williams Natural Gas Company.

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PETITION FOR WRIT OF CERTIORARI

This case presents the question left open in *Honda Motor Co. v. Oberg*, 512 U.S. 415, 114 S.Ct. 2331, 2347 n.10 (1994) ("*Oberg*") of "what standard of review is constitutionally required in a punitive damages case."[1] Petitioners, Continental Trend Resources, Inc., *et al.*[2] (hereinafter collectively "CTR"), petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit. On remand from this Court, in a two to one decision, the presiding panel (hereinafter the "Majority") conducted a *de novo* review of the evidence, relied on evidence never introduced at trial, and remitted a $30 million punitive damage award in favor of CTR to $6 million. The Court of Appeals had previously utilized a deferential standard of review and unanimously affirmed the award. The Majority's decision, issued over a strong dissent, is contrary to this Court's holding in *Gasperini*.

The Majority also managed to do what this Court has steadfastly refused to do in no less than three cases decided in the past five years -- set a maximum ratio of compensatory to punitive damages without regard to the facts. That decision is inconsistent with other federal cases decided after *Gasperini* and *BMW*, and aggravates an alarming trend of

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[1] In *Gasperini*, the Court appeared to settle the question by implicitly holding that deferential review by a court of appeals is required in both compensatory and punitive damage cases. 116 S.Ct. at 2221 n.12.

[2] The other Petitioners are Harold G. Hamm, Trustee of the Harold G. Hamm Revocable Inter Vivos Trust; Gary H. Wright, Cindy Wright, Jeffrey B. Hume, and Farrar Oil Company.

courts disregarding a litigant's constitutional rights under the Fifth, Seventh and Fourteenth Amendments.

Review by this Court is necessary (i) to settle the issue of what standard of review is constitutionally required in a punitive damages setting, (ii) to protect the cherished constitutional right to trial by jury afforded by the Seventh Amendment, (iii) to correct a published decision of the Court of Appeals which conflicts with this Court's recent precedents, and (iv) to halt the proliferation of decisions which will cause confusion among district and appellate courts, both state and federal, in the application of *Gasperini* and *BMW*.

OPINIONS BELOW

The opinion of the Court of Appeals, of which review is sought by this Petition, is reported at 101 F.3d 634 and reprinted at App. 1a. The Court of Appeals' unpublished order denying CTR's petition for rehearing and suggestion for rehearing *en banc* is reprinted at App. 27a. The order of this Court granting OXY USA Inc.'s ("OXY") previous petition for certiorari, vacating the first opinion of the Court of Appeals, and remanding the case to the Court of Appeals for reconsideration in light of *BMW* is reprinted at App. 30a. The first opinion of the Court of Appeals is reported at 44 F.3d 1465 and reprinted at App. 32a. The order of the district court denying OXY's post-trial motions is reported at 810 F.Supp. 1520 and reprinted at App. 61a.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1337 and 1367. The Majority entered its judgment on November 26, 1996. CTR filed a timely petition for rehear-

ing and suggestion for rehearing en banc on December 9, 1996. CTR's petition was denied on January 29, 1997. CTR's request for stay of the mandate was granted until March 31, 1997. The jurisdiction of this Court is invoked within ninety (90) days of the denial of CTR's petition for rehearing pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the reexamination clause of the Seventh Amendment and the due process clauses of the Fifth and Fourteenth Amendments. The Amendments are set out verbatim at App. 92a.

STATEMENT OF THE CASE

This case is before the Court for the second time. In June 1996, this Court granted OXY's petition for certiorari and vacated the prior unanimous opinion of the Court of Appeals which had affirmed a $30 million punitive damage verdict in favor of CTR. The Court remanded the case to the Court of Appeals for reconsideration in light of its decision in *BMW*. App. 30a. In between the Court's remand and the issuance of the Majority's judgment below, *Gasperini* was decided and its application was urged by CTR on remand.

Statement of Facts and Pre-Remand Decisions [3]

CTR filed the instant suit in June 1990, alleging, in part, that OXY tortiously interfered with CTR's existing and prospective contracts. In April 1991, at the conclusion of a three week trial, the jury awarded CTR $269,000 in compensatory damages and $30,000,000 in punitive damages.

The district court conducted a post trial review of the jury's verdict in accordance with *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) ("*Haslip*"). (District Court Opinion ["D. Ct. Op."], App. 61a.) Based on its first hand review of the evidence, the district court concluded that "the jury viewed [OXY] with justifiable disapprobation", *id.* at 81a, and that OXY's conduct was "certifiably reprehensible," *id.* at 90a, and "insidious." *Id.* at 79a. All of the indicia identified in *BMW* as being associated with reprehensible conduct and warranting a substantial punitive damage award were found to be present by the district court. (*Id.* at 74a-91a; *see also* First Opinion of the Court of Appeals ["First Op."], App. 42a-53a; Majority Opinion ["Maj. Op."], App. 5a-19a; Dissenting Opinion ["Diss. Op."], App. 22a-26a.)

The first decision of the Court of Appeals was rendered with the benefit of this Court's opinions in *Oberg* and *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993) ("*TXO*"). App. 43a. The First Opinion noted that the record contained "voluminous evidence that OXY

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[3] The specific facts underlying CTR's claims for relief against OXY are detailed in the district court's opinion denying OXY's post-trial motions, App. 62a-63a, and the first opinion of the Court of Appeals. App. 34a-38a. They will not be repeated here except as pertinent to the issues raised herein.

engaged in oppressive and coercive behavior," and found that "the consequences of such unchecked behavior could be disastrous." *Id.* at 52a-53a. The Court of Appeals further determined that "the district court properly allowed the jury to consider the potential harm that might result if [OXY's] conduct continued unabated." *Id.* On this latter issue, the Court of Appeals considered OXY's potential profit and found that "the punitive damage award was actually six times OXY's potential profit." *Id.* at 47a.

The Decision on Remand

The Majority, charged to reconsider the case in light of *BMW*, did not change its view of OXY's conduct. It stated that "OXY's actions, as found by the jury, would be condemned universally." App. 11a. It also found that, "this is not a case like *BMW* where the Court found 'no deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive.'" *Id.* at 12a. The Majority nevertheless reduced the punitive award by $24 million. *Id.* at 21a. It is apparent from the Majority's decision that it applied a *de novo* standard of review based on its reference to and its utilization of the "rule of independent review" set forth in *Bose Corp. v. Consumer's Union of United States*, 466 U.S. 485 (1984). *Id.* at 20a.

The Majority, in applying *BMW*, found in CTR's favor on nearly every criterion. The Majority concluded that OXY was properly punished for conduct committed within the State of Oklahoma. *Id.* at 5a-6a. It had "no difficulty" finding that OXY received "fair notice of the conduct that [would] subject [it] to punishment." *Id.* at 8a. The Majority based its remittitur solely upon its application of one of the three guideposts (the "ratio" guidepost) identified in *BMW* to

determine whether a defendant has received "fair notice ... of the severity of the penalty that a state may impose." *Id.* at 9a.

As to the first *BMW* guidepost, the "degree of reprehensibility of the defendant," there was "sufficient evidence in the record of the reprehensibility of OXY's conduct to support a 'substantial penalty.'" *Id.* at 11a. A comparison of the punitive award and the civil and criminal penalties that could be imposed for comparable misconduct, the third *BMW* guidepost, led the Majority to conclude that OXY had "sufficient notice ... of the potential for [a] large punitive award[]." *Id.* at 16a. However, in conducting its analysis of the second guidepost -- the ratio of the punitive award to the harm inflicted -- the Majority found the ratio to be "too large." *Id.* at 19a. In reaching this conclusion, the Majority found that $6 million was the "maximum constitutionally permissible punitive damages award justified by the facts of this case" because it was "within the range of a 1 to 4 to a 1 to 10 ratio which [the Majority] believe[d] *BMW* imposes in cases such as this -- involving commercial litigation with substantial actual and potential damages." *Id.* at 21a.

The Majority based its "ratio" conclusion on a revised "*de novo*" finding of "harm" predicated in large part on evidence outside the trial record. *Id.* at 12a-15a. It interpreted *BMW* to mean that only "potential harm to the plaintiff" may be considered in conducting the ratio analysis, and, thus, it eschewed any consideration of OXY's expected gain or potential harm to other "in state" victims. *Id.* at 13a. The Majority also reduced its own previous finding of potential harm to CTR from $5 million (the district court found potential harm of $80-90 million [App. 80a]) to $1 million based on two affidavits of limited scope which were never admitted

into evidence nor presented to the jury for its consideration. *Id.* at 13a-15a.

Despite CTR's urging to the contrary, the Majority held that it was not required to remand the case to the district court to allow it to conduct its own excessiveness review as required by *Gasperini*. *Id.* at 19a-20a. Instead, it held that the issue of whether a punitive damage award violated the substantive prong of the due process clause was a federal constitutional issue which it had "the power to decide" *de novo* and without regard to the Seventh Amendment. *Id.* at 20a.

The dissenting opinion agreed that the Majority "thoroughly and correctly analyzed the 'guidelines' that are to be found in *BMW*," but disagreed with the Majority's "ultimate conclusion that $6 million is the maximum constitutionally permissible punitive damage award under the facts and law which govern this case." *Id.* at 22a. The dissent found the conduct under scrutiny in *BMW* to be "clearly distinguishable" from OXY's conduct. *Id.* In particular, the dissent criticized the Majority's finding of "approximately $1 million in actual and potential loss, while OXY's own evidence would support a higher figure of $2 million." (Emphasis in original.) *Id.* at 24a. The dissent explained:

> Since the Majority further noted that 'in economic injury cases if the damages are significant and the injury not hard to detect, the ratio of punitive damages to the harm generally cannot exceed a ten to one ratio,' these damage figures alone would justify a punitive damage award of between $10 and $20 million. When the additional factor of the extent

> and nature of OXY's income and net worth is added as a consideration, one begins to approach the original jury award of 30 million, and this judge can only conclude that an award of not less than 20 million would be permissible and required under the circumstances found in this record without violation of the concept of due process.

Id. at 24a-25a.

REASONS FOR GRANTING THE WRIT

This case presents "[a] direct conflict between the decision of the Court of Appeals of which review is being sought and a decision of the Supreme Court[,] ... one of the strongest possible grounds for securing the issuance of a writ of certiorari." R.L. Stearn, E. Gressman, S. Shapiro, K. Geller, *Supreme Court Practice* (7th Ed. 1993) at 174. The Majority's decision contains at least two holdings that are contrary to opinions issued by this Court. It also presents the precise issue left open in *Oberg* of what standard of review is constitutionally required in a punitive damages case. If allowed to stand, the Majority's holdings will engender confusion and conflict among the district and circuit courts and spawn consequences never envisioned nor contemplated by this Court.

I. THE MAJORITY'S DECISION CONTRAVENES THE REEXAMINATION CLAUSE OF THE SEVENTH AMENDMENT AND THIS COURT'S HOLDING IN *GASPERINI*

The reexamination clause of the Seventh Amendment provides that "the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in a any court of the United States, other than according to the rules of the common law." U.S. Constitution, Amendment VII. The Majority's *de novo* review of the judgment violates the reexamination clause and this Court's holding in *Gasperini*.

In *BMW*, the Court discussed "'the character of the standard that will identify constitutionally excessive awards' of punitive damages." 116 S.Ct. at 1595. It did not change nor comment on the procedures used to perform the review and reaffirmed that if "fair procedures were followed, a judgment ... is entitled to a strong presumption of validity." 116 S.Ct. at 1604 (Breyer, J., concurring) [citing *TXO*, 509 U.S. at 457].

The *Gasperini* decision was rendered after *BMW* and addressed "the standard a federal court uses to measure the alleged excessiveness of a jury's verdict in an action for damages based on state law." 116 S.Ct. at 2217.[4] This Court reaffirmed the deferential review test applied in the punitive damage case of *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989)

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[4] The claims that actually went to trial in this case were pendent state claims governed by Oklahoma law.

("*BFI*"), and observed that the district court has the primary responsibility in an excessiveness review. 116 S.Ct. at 2225.[5]

This Court also noted that "[t]rial judges have the 'unique opportunity to consider the evidence in the living courtroom context' [citation omitted], while appellate judges see only the 'cold paper record' [citation omitted]." *Id.* *Gasperini* teaches that in a diversity case, the proper distribution of functions between the trial court and the court of appeals is a matter of federal law; and in the federal system, "the district court is to determine whether the jury's verdict is within the confines set by state law", and the "court of appeals should then review the district court's determination under an abuse of discretion standard." 116 S.Ct. at 2224 [quoting *BFI*, 492 U.S. at 279]. Appellate review "counsels restraint" and "must give the benefit of every doubt to the judgment of the trial judge." *Id.* [citations omitted].

The federal courts are in disarray in applying *Gasperini*. For example, some federal decisions have followed this Court's admonition that the Seventh Amendment prohibits a court of appeals from redetermining a fact issue decided by a jury. *See Steinke v. Beach Bungee, Inc.*, 105 F.3d 192, 198 (4th Cir. 1997) (*Gasperini* "'lodge[s] in the district court, not the court of appeals, the primary responsibility' of applying state standards to motions for remittitur."); *Outboard Marine Corp. v. Babcock Indus.*, 106 F.3d 182, 186 (7th Cir. 1997) ("The trial judge did not consider the verdict unreasonable,

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[5] *Gasperini* involved a challenge to a compensatory damage award. This Court observed, however, that the same standards are to be applied for review of both compensatory and punitive damages. *See* 116 S.Ct. at 2221 n.12, 2223 n.18.

and he had the advantage over us of having heard the evidence at first hand and observed the jury. His judgment is therefore entitled to considerable deference."); *Consorti v. Armstrong World Industries, Inc.*, 103 F.3d 2, 3 (2nd Cir. 1996) ("[W]e remand so that the district court may reconsider the motion for remittitur, 'check the jury's verdict against the relevant New York decisions' and 'test [it] against CPLR's 5501(c)'s "deviates materially" standard.' *Id.* The district court's decision will then be subject to appellate review only for abuse of discretion."). Other federal courts line up, at least in part, with the Tenth Circuit's disregard of *Gasperini*. *See Kimzey v. Wal-Mart Stores, Inc.*, __ F.3d __, 1997 WL 68196 (8th Cir., Feb. 20, 1997) (where the court, in reviewing the district court's remittitur, ordered the district court to further remit a punitive damages verdict without affording the plaintiff the option of a new trial); *Mejias-Quiros v. Maxxam Property Corp.*, __ F.3d __, 1997 WL 104057 (1st Cir., Mar. 13, 1997) (where the court ordered a remittitur of a compensatory verdict without allowing the district court to revisit its denial of defendant's motion for new trial); *Lee v. Edwards*, 101 F.3d 805, 813 (2nd Cir. 1996) (where, after finding the district court "abused its discretion," in denying a motion for new trial, went on to order a remittitur of a punitive award without allowing the district court to revisit its ruling). Such reexamination of facts renders the Seventh Amendment prohibition meaningless.

In addressing *Gasperini*, the Majority conceded that the "Seventh Amendment prohibits the Court of Appeals from redetermining a fact issue decided by a jury, and that "if it reverses [the appellate court] must remand the case to the district court so that it may revisit its prior ruling." App. 19a-20a. The Majority also acknowledged that *Gasperini*

"would apply the same standard to punitive damage awards." *Id.* at 20a.

The Majority nevertheless refused to follow *Gasperini* for two reasons. First, the Majority found that it was not "redetermining a fact issue found by a jury." *Id.* Surprisingly, this conclusion is based on Justice Scalia's dissent in *Gasperini* wherein he stated that "the level of punitive damages is not really a 'fact' 'tried' by the jury." *Gasperini*, 116 S.Ct. at 2235. Second, the Majority observed that *Gasperini* does not "prevent[ ] us from determining in the first instance the amount of a remittitur, because the issue of how much of the $30 million award the United States Constitution allows is one of constitutional fact that the appellate courts have the power to decide." App. 20a. For this startling conclusion, the Majority relied on *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501 n.17 (1984), wherein this Court stated that "[r]egarding certain largely factual questions in some areas of the law, the stakes ... are too great to entrust them finally to the judgment of the trier of fact." *Id.* The Majority reasoning is not only wrong; it conflicts with the holdings of this Court and other circuit courts.

(1) The Amount Of Punitive Damages Is A Fact Issue To Be Decided By The Jury Which Cannot Be Reexamined

The Majority's holding that the amount of punitive damages is not a fact issue is at odds with hundreds of years of jurisprudence. Prior to the Majority's decision, it was well settled that the amount of punishment necessary to fulfill a state's goal of deterrence and retribution was solely within the province of the jury, subject to appropriate judicial and appellate review. *See, e.g., Martin v. Texaco Inc.*, 726 F.2d

207, 213 (5th Cir. 1984) (punitive damages depend in part upon "the extent to which that conduct offends a public sense of justice and propriety"); *Federal Deposit Ins. Corp. v. W.R. Grace & Co.*, 691 F.Supp. 87, 100 (N.D. Ill. 1988) (jury's "unanimous verdict tells us what the community thinks the result should be"), *aff'd in part and rev'd in part on other grounds*, 877 F.2d 614 (7th Cir. 1989), *cert. denied*, 494 U.S. 1056 (1990); Alan H. Scheiner, *Judicial Assessment Of Punitive Damages, The Seventh Amendment, And The Politics Of Jury Power*, 91 Columbia L. Rev. 142 (1991); Lisa M. Sharkey, Comment, *Judge Or Jury: Who Should Assess Punitive Damages?*, 64 Univ. of Cinn. L. Rev. 1089 (1996).[6] *See also Haslip*, 499 U.S. at 15-16.

Indeed, relying on this Court's holding in *TXO* and *Haslip*, the Court of Appeals had previously found that the amount of punitive damages was a fact issue to be decided by the jury. *See, e.g., Patton v. TIC United Corp.*, 77 F.3d 1235, 1245 (10th Cir.), *cert. denied*, 116 S.Ct. 2525 (1996); *Capstick v. Allstate Ins. Co.*, 998 F.2d 810, 819-22 (10th Cir. 1993) (emphasizing that review of the punitive damage verdict is based on a "shock the judicial conscience" standard and there must be a strong showing of abuse of discretion; amount of punitive damages is "traditionally a jury function.... This is so because the jury has heard the evidence first hand and has observed the demeanor of the witnesses. The jury must have much discretion to fix the damages deemed proper....").

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[6] Recently, an attempt by the Ohio Legislature to require a judge, not the jury, to set the amount of punitive damages was held to be an unconstitutional abridgement of the right to trial by jury. *Zoppo v. Homestead Ins. Co.*, 644 N.E.2d 397, 401 (Ohio 1994), *cert. denied*, 116 S.Ct. 56 (1995).

The level of punitive damages imposed by a jury is always laden with factual findings, ranging from the existence and extent of the defendant's reprehensibility to the severity and impact of the defendant's conduct. (D. Ct. Op., App. 75a-86a.) The jury's findings are admittedly reviewed in the context of applicable law, but regardless of the law's source, *i.e.*, whether it is the Constitution or otherwise, the factual characteristics of the jury's findings do not somehow vanish because the "Constitution" provides substantive "guideposts" or "factors" by which to measure excessiveness. *See Thornburg v. Gingles*, 478 U.S. 30, 79 (1986) ("The fact that amended § 2 [of the Voting Rights Act] and its legislative history provide legal standards which a court must apply to the facts in order to determine whether § 2 has been violated does not alter the standard of review.").

A comparison of the holdings in *BFI*, *Gasperini* and the Majority Opinion illustrate the infirmity of the Majority's "non-fact" characterization. *BFI* admonished, "it is not [the Court's] role ... to substitute [its] judgment for that of the jury." 492 U.S. at 278. *Gasperini* instructed that a district court has the primary responsibility in an excessiveness review and the district court's determination is then "subject to appellate review under the standard the Circuits now employ when inadequacy or excessiveness is asserted on appeal: abuse of discretion." *See* 116 S.Ct. at 2215. The Majority flouted the holdings of *BFI* and *Gasperini* and applied a *de novo* review, lodging the primary review in the court of appeals, giving the district court's determination no credence and substituting its judgment for that of the jury.

This procedure stands the Seventh Amendment on its head.[7] CTR respectfully submits that certiorari should be granted to reinstate the validity of the right to trial by jury.

(2) *Gasperini* Requires A Deferential Review Of The Amount Of Punitive Damages On An Excessiveness Claim

The Majority's reliance on *Bose Corp. v. Consumers Union of United States*, 466 U.S. 485 (1984) is also misplaced. The *Bose* decision addressed the rule of independent review (often called the "New York Times" rule) in a First Amendment setting. The rule has been sparingly applied by this Court and has primarily been reserved for First Amendment inquiries such as "actual malice" determinations in defamation cases. *Id.* at 502-11.

The implications of the Majority's holding are shocking and wide ranging. If allowed to stand, the Majority's opinion effectively changes the standard of review in punitive damage cases and creates an unprecedented exception to the Seventh Amendment. There are several reasons which militate against such an extraordinary and unwarranted change in the law.

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[7] As Justice Scalia noted, "the sort of 'legal error' involved here is the imposition of legal consequences (in this case, damages) in light of facts that, under the law, may not warrant them. To suggest that every fact may be reviewed, because what may ensue from an erroneous factual determination is a 'legal error,' is to destroy the notion that there is a fact-finding function reserved to the jury." (Emphasis in original.) *Gasperini*, 116 S.Ct. at 2237 n.10 (Scalia, J., dissenting).

First, this Court itself has applied a deferential standard of review in conducting its excessiveness review under the due process clauses. *See TXO*, 509 U.S. at 447 ("The jury verdict in respondents' favor, which has been affirmed ... makes it appropriate to accept respondents' version of disputed issues of fact."); *Haslip*, 499 U.S. at 21-24 (upholding Alabama's deferential review as being consistent with procedural due process).[8] In *BFI*, this Court specifically refused to impose a heightened standard of review in punitive damage cases stating, "we perceive no federal common-law standard, or compelling policy, which convinces us that we should not continue to accord considerable deference to a district court's decision not to order a new trial." 492 U.S. at 279-80. The Court based its refusal on the premise that "federal courts operate under the strictures of the Seventh Amendment" and thus must be "reluctant to stray too far from traditional common law standards, or to take steps which ultimately interfere with the proper role of the jury." *Id.* at 280 n.26. *See also Oberg*, 114 S.Ct. at 2347 n.10.

Second, the application of the independent review rule in a punitive damage setting is unworkable. In *Bose*, this Court reiterated that the rule applies only to those "portions of the record which relate to the actual-malice determination...." 466 U.S. at 514 n.31. ("The independent review function is not equivalent to a '*de novo*' review of the ultimate judgment itself....") *Id.* The Majority, however, applied a *de novo* review to the ultimate judgment itself --

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[8] In Alabama, "jury verdicts are presumed correct, and that presumption is strengthened when the presiding judge refuses to grant a new trial." *Pacific Mut. Life Ins. Co. v. Haslip*, 553 So.2d 537, 543 (Ala. 1989).

the entire record -- and then proceeded to consider evidence not in the record. If left unchecked, the decision would require plenary review of all fact findings underlying a punitive award -- a proposition well beyond any rule of special review heretofore sanctioned by this Court.

Third, while the protection of freedom of speech is worthy of heightened scrutiny, this Court has never afforded such protection in the due process setting and has refused to apply the rule to other inquiries of so-called "constitutional fact." *See, e.g., Maine v. Taylor*, 477 U.S. 131, 145 (1986) ("We note, however, that no broader review is authorized here simply because this is a constitutional case, or because the factual findings at issue may determine the outcome of the case."); *Hernandez v. New York*, 500 U.S. 352, 366 (1991) (where this Court held, in an equal protection case, that "an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question." [quoting *Miller v. Fenton*, 474 U.S. 104, 113 (1985)]); *Wheat v. United States*, 486 U.S. 153, 163 (1988) (where, in a Sixth Amendment right to counsel case, this Court held that the "evaluation of the facts and circumstances of each case ... must be left primarily to the informed judgment of the trial court."); *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 534 (1979) (finding of intent to discriminate is subject to clearly erroneous standard of review). *See also, Miller v. Fenton*, 474 U.S. at 114 ("On rare occasions in years past the Court has justified independent federal or appellate review as a means of compensating for 'perceived shortcomings of the trier of fact by way of bias or some other factor....'").

The Majority's holding that the issue was one "too great to entrust to the judgment of the trier of fact" is

therefore clearly contrary to *Gasperini* and the Seventh Amendment's prohibition against reexamination of facts. Carried to its logical extreme, any punitive damage award would be reviewable *de novo* because every excessive verdict, compensatory or punitive, implicates the due process clauses of the Fifth and Fourteenth Amendments. *TXO*, 509 U.S. at 471. This result cannot be squared with the Seventh Amendment or *Gasperini*. This Court should grant certiorari to decide the question left open in *Oberg* and hold that punitive damage excessiveness reviews are subject to deferential review as held in *Gasperini*.

A. The Majority's Reliance On Evidence Outside The Trial Record Contravenes The Seventh Amendment

The Majority made a finding of fact when it concluded that $1 million was the extent of CTR's actual and potential harm.[9] This finding was based on evidence never presented to the jury; it was also contrary to evidence actually admitted at trial. The Majority's finding also cannot be reconciled with the Court of Appeals' First Opinion finding potential harm of up to $5 million.[10]

In order to ensure the protections afforded by the reexamination clause of the Seventh Amendment, appellate review must be deferential. *Gasperini*, 116 S.Ct. at 2223-24.

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[9] As the dissent noted, "OXY's own evidence ... support[ed] a higher figure of $2,000,000." (Emphasis in original.) App. 24a.

[10] The district court, based on a consideration of "evidence in the living courtroom context", *Gasperini*, 116 S.Ct. at 2225, found potential harm of $80-90 million. App. 80a.

But whether the review is deferential or *de novo*, it plainly should be based on evidence the jury considered. Otherwise, it is not a "review" which is occurring; rather, the appellate court is conducting its own alternate fact finding process without regard to the rules of evidence, without regard to the right of cross-examination, and in the end, without regard to due process. Such an unprecedented procedure usurps the fact finder's function and violates the litigant's Seventh Amendment rights.

1. The Jury's Finding

The jury's decision to impose punitive damages in this case properly included an estimate of both the potential harm and the expected gain associated with OXY's conduct. *See BMW*, 116 S.Ct. at 1602-03; *TXO*, 509 U.S. at 462. The jury was instructed to consider the culpability of the defendant and the extent of the harm which the defendant inflicted. Maj. Op., App. 6a-8a. Common notions of a defendant's culpability include not just the harm inflicted on the plaintiff, but also the harm suffered by others. The jury's finding, of course, was predicated only on the evidence actually presented to it.

As in *TXO*, CTR's counsel argued that OXY's misconduct had widespread effects, not only on CTR but on other producers as well. *TXO*, 509 U.S. at 460-61. Evidence was specifically introduced for this purpose. In closing arguments, CTR's counsel asked the jury to consider the harm, both actual and potential, caused by OXY's conduct. The substantial punitive award rendered by the jury is indicative of the finding that OXY's conduct warranted severe punishment based upon what OXY hoped to gain by its acts of oppression. (D. Ct. Op., App. 80a-81a.)

2. The Majority's Contrary Finding

Both the first opinion and the Majority Opinion approved a ratio of punitive damages to harm of 6 to 1. (First Op., App. 46a-47a n.15; Maj. Op., App. 21a.) Faced with the identical record, however, the Majority determined on remand that its "best estimate" of potential harm to CTR was $1 million, not the $5 million it unanimously found to be the potential harm in the first opinion. App. 13a-15a. Thus, it concluded that $6 million, not $30 million, was the maximum constitutionally permissible punitive damages award. *Id.*

The $1 million "best estimate" potential harm figure was based on an affidavit not introduced in evidence and not considered by the jury which addressed only 79 of the 140 producing wells at issue. (*Id.* at 14a.)[11] A brief discussion of the affidavit(s) illustrates both the danger of relying on evidence outside the record and the due process violations which result from such a review.

The affidavits were part of the appellate record solely because of CTR's appeal of the antitrust summary judgment order and focused on the issue of whether the Rodman Gathering System was an "essential facility" for antitrust purposes. The affidavits were not introduced in evidence at trial, never seen by the jury and were not properly considered by the Court of Appeals in reviewing the verdict. *See TXO*, 509 U.S. at 467 ("It is commonplace that a jury verdict must be reviewed in relation to the record before it.") *See also*

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[11] The record evidence cited by the Majority is actually excerpts from two affidavits -- those of John Brickhill and Roger Williams -- neither of which was introduced at trial.

Volkman v. United Transp. Union, 73 F.3d 1047, 1054 (10th Cir. 1996); *O'Gilvie v. International Playtex, Inc.*, 821 F.2d 1438, 1449 (10th Cir. 1987) (punitive damage remittitur cannot be based on matters outside the record); *Marshall v. El Paso Natural Gas Co.*, 874 F.2d 1373, 1384 (10th Cir. 1989) (same).

The Majority nevertheless chose to rely on the affidavits and compounded its error by ignoring the evidence the jury did hear on actual and potential harm.[12] The trial record shows that CTR was severely harmed by OXY's wrongful conduct.[13] The jury heard, without objection, (1) that CTR expended over $2 million to build its own gathering system to move stranded gas; (2) that CTR plugged and abandoned wells as a result of OXY's conduct; (3) that OXY exacted millions of dollars of unjustified gathering fee charges on CTR; (4) that OXY failed to pay for gas in order to coerce CTR into changing its position; and (5) that OXY nearly decimated CTR's business. *Id.* The jury was permitted to believe this evidence. *See Klein v. Grynberg*, 44 F.3d 1497, 1503 (10th Cir.), *cert. denied*, 116 S.Ct. 58 (1995) ("*Klein*").

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[12] It is firmly settled that the record is to be reviewed as a whole in a light most favorable to the prevailing party. *See, e.g., Patton v. TIC United Corp.*, 77 F.3d 1235 (10th Cir.), *cert. denied*, 116 S.Ct. 2525 (1996).

[13] *See, e.g.*, Aplee. App. 618-31, 1453, 1493A, 1497, 1500-07, 1532-35, 1613, 1615A, 1883, 1892, 1906-14, 1919-54, 2156-60, 2169-70, 2186A-B, 2193-94, 2208, 2215A-18, 2258, 2269-70, 2278, 2309-12, 2314-15, 2351-53, 2355, 2358, 2362-83, 2405-10, 2412-16, 2445-47, 2502-2515G, 2599-2608, 2647A-B; Aplt. App. 1769, 2336-45.

The Majority noted that the jury could have arrived at a higher figure of potential harm using OXY's evidence on its counterclaim. App. 14a. It cited $3,242,800 as the potential harm figure (instead of the $5 million it found in the first opinion). OXY introduced evidence, however, that it was deprived of lost proceeds of at least $4.25 million (*see* D. Ct. Op., App. 79a; First Op., App. 46a), and that no costs were associated with those lost profits at the Rodman Plant.[14] It is the very essence of the jury function to decide what evidence to believe. *See Klein, supra* at 1503; *Mitchell v. Maynard*, 80 F.3d 1433, 1443 (10th Cir. 1996). Nevertheless, the Majority cited five record references (2 of which were not introduced at trial) to *sua sponte* reduce the amount of profit sought by OXY at trial. App. 13a-14a. Thus, the Majority impermissibly invaded the province of the jury. *See Medcom Holding Co. v. Baxter Travenol Laboratories*, 100 F.3d 1241 (7th Cir. 1996); *Klein*, 44 F.3d at 1504. Further, the non-admitted affidavits related solely to the gathering fee OXY was illegally charging (profiting from) for use of Williams Natural Gas Company's (a co-defendant at the trial stage) Rodman Gathering System (*see* D. Ct. Op., *passim*), not expensing for operation of the Rodman Processing Plant. In other words, the Majority made factual findings which reduced OXY's potential profit by subtracting additional profit realized by OXY. *Id.* (noting OXY's profit from illegal gathering fee charges).

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[14] At trial, OXY's expert told the jury OXY would incur no additional costs to process CTR's gas because the majority of the costs were fixed costs and the variable costs were absorbed by the producers. There was no issue on this fact until the Court of Appeals' *de novo* review.

The Majority's redetermination of potential harm illustrates the inherent problems which arise when an appellate court finally decides issues of fact that will form the basis of its entry of a remittitur. The district court, as noted in *Gasperini*, is in a better position to review findings of fact, including potential harm. The Majority's opinion explicitly condones a procedure that is at odds with the Seventh Amendment. It constitutes a *de novo* redetermination of a fact that does not, in the least, give any deference to the fact finding of the jury or the first hand evidentiary review of the district court. CTR was never given an opportunity to cross-examine, explain or elaborate on the non-admitted evidence. Nothing could be a more apparent violation of CTR's Seventh Amendment right to trial by jury and Fourteenth Amendment right to due process. This Court should grant CTR's petition and hold that an appellate court cannot, consistent with the Seventh and Fourteenth Amendments to the Constitution, base a remittitur on evidence outside the record.

B. The Majority's Reduction Of The Jury's Verdict To An Amount Below The Maximum Allowed Under The Law Violated The Seventh Amendment

As noted, the only *BMW* guidepost upon which the Majority rested its remittitur was the ratio of harm to punitive damages. On all other criteria, the Majority found in favor of CTR. In arriving at the figure of $6,000,000, the Majority stated, "this amount is approximately six times the actual and potential damages [CTR] suffered according to our best estimate" and it "is within the range of a one to four to a one to ten we believe *BMW* imposes in cases such as this...." App. 21a. Thus, the Majority construed *BMW*, albeit wrongly, to

impose a maximum ratio of one to ten "in [a] case[ ] such as this...." *Id.* Despite this construction, the Majority reduced the jury's verdict to a six to one ratio, clearly below an amount it "believe[d]" it could have awarded. *Id.*

BMW does not support the proposition that an appellate court can assume the function of a jury and make its own independent findings of the amount necessary to deter future misconduct. Such a holding violates the reexamination clause of the Seventh Amendment.

Numerous courts of appeal, including the Tenth Circuit, have held that an excessive verdict may be reduced only to the maximum amount that the jury could have awarded. *See K-B Trucking Co. v. Riss Intern. Corp.*, 763 F.2d 1148, 1162 (10th Cir. 1985). The theory that permits reduction only to the highest amount the jury could have properly awarded is "the only theory that has any reasonable claim of being consistent with the Seventh Amendment." *See, e.g.*, C. Wright, A. Miller and M. Kane, *Federal Practice And Procedures*, § 2815 at 168-69 (2d ed. 1995); *K-B Trucking*, 763 F.2d at 1162-63 n.21 (citing Wright & Miller). *See also Goldstein v. Manhattan Industries, Inc.*, 758 F.2d 1435, 1447-48 (11th Cir. 1985) ("[A] remittitur order reducing a jury's award to the outer limit of the proof is the appropriate remedy where the jury's damage award exceeds the amount established by the evidence."); *Dixon v. International Harvester Co.*, 754 F.2d 573, 590 (5th Cir. 1985) (employing a "maximum recovery rule" to determine the size of a remittitur "by reducing the verdict to the maximum amount the jury could properly have awarded").

A court of appeals has no authority to independently review the "cold paper record" and reduce an award to the

least amount the jury could have properly awarded and still fulfill the state's legitimate interest in deterrence and punishment. Instead, if any remittitur is appropriate, the award is required to be reduced, consistent with the Seventh Amendment, to the maximum amount the jury could have awarded. This amount, as the Dissenting Opinion observed, is a minimum of $20 million and more likely the $30 million awarded by the jury. App. 24a-25a. This Court should grant CTR's petition and rectify a published decision that is in conflict with the Constitution and settled case law.

II. THE MAJORITY'S MATHEMATICAL CAP OF A 10 TO 1 RATIO IS CONTRARY TO *BMW* AND EXISTING PRECEDENT

The Majority's bright line "ten to one ratio in commercial injury cases [where] the damages are significant and the injury not hard to detect" was rejected outright by this Court in *BMW*, *TXO* and *Haslip* and is in conflict with other circuits. *BMW* rejected a categorical approach that economic injury cases require a lower punitive award no matter how egregious or wrongful the misconduct. This Court instead expressly held that intentional infliction of economic injury to a financially vulnerable target warrants a "substantial penalty." 116 S.Ct. at 1599. "Of course, we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award." *BMW*, 116 S.Ct. at 1602 (*citing TXO*, 509 U.S. at 458).

The Court emphasized that "[i]t is appropriate, therefore, to reiterate our rejection of a categorical approach" and that "[i]n most cases, the ratio will be within a constitutional-

ly acceptable range, and remittitur will not be justified on this basis." *Id.* at 1602-03. (Emphasis added.) *See also Klein*, 44 F.3d at 1504 ("This court has never held that any ratio is per se excessive," because "[t]here is no bright line between an acceptable and an unacceptable award of punitive damages. Instead, the standard is one of reasonableness.").

The Majority's bright line test for economic injury cases has been uniformly rejected because "[a]ssuming that fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption of validity," *TXO*, 509 U.S. at 457. *See also BMW*, 116 S.Ct. at 1604 (Breyer, J., concurring); *Haslip*, 499 U.S. at 24-40 (Scalia, J., concurring in judgment). *See also TXO*, 509 U.S. at 457; "[t]he Constitution identifies no particular multiple of compensatory damages as an acceptable limit for punitive awards; it does not concern itself with dollar amounts, ratios, or the quirks of juries in specific jurisdictions," *see TXO*, 509 U.S. at 467 (Kennedy, J., concurring), and the "principles of federalism counsel against [mathematical tests]." *See TXO*, 509 U.S. at 483 (O'Connor, J., dissenting).

Most federal and state court decisions after *BMW* have continued to reject any suggestion that there is a mathematical test or ceiling that can be applied in determining whether an award is "grossly excessive." *See, e.g., Coleman v. Kaye*, 87 F.3d 1491 (3rd Cir. 1996), *cert. denied*, 117 S.Ct. 754 (1997); *Iannone v. Frederic R. Harris*, 941 F.Supp. 403, 414 (S.D.N.Y. 1996) ("[N]o rigid ratio can be applied" because one must take into account all of the relevant factors in determining whether a punitive damage award is grossly excessive); *Schaffer v. Edward D. Jones & Co.*, 552 N.W.2d 801, 811 n.11 (S.D. 1996) (holding that after *BMW*, ratio comparisons are of limited value because *BMW* held that no

mathematical formula could be applied and that *BMW* "made it clear that overturning a punitive verdict on ratio considerations would be the exception rather than the rule"); *Walston v. Monumental Life Ins. Co.*, 923 P.2d 456, 468 (Idaho 1996) ("[T]he U.S. Supreme Court in *BMW* made it clear that it was not prescribing a mathematical formula to be followed.").

Adoption of a mathematical formula by a federal court of appeals for limiting punitive damages, whether in an economic injury case or a personal injury case, as the Majority has done, invades the province of the states, represents bad public policy and is contrary to this Court's extant precedent. It grants OXY and other tortfeasors the license to treat punitive damages as the mere cost of doing business and to play "enforcement lottery" by continuing their tortious practices with the anticipation that they will be sued successively fewer times than they succeed so they will still profit by their wrongful acts. This Court should grant the requested writ to address this issue of exceptional importance.

A. The Majority's Exclusion Of OXY's Expected Gain And The Potential Harm To Others In Conducting Its Ratio Analysis Is Contrary To *BMW* And *TXO*

In conducting its ratio analysis, the Majority noted that "the *BMW* opinion is somewhat confusing by its several references discussing ratios in the context of all fourteen of the Alabama purchasers of repainted new cars rather than to the single plaintiff in that case. But the *BMW* opinion stated more than once that the relevant ratio was 'to the actual harm inflicted on the plaintiff.'" Based on this interpretation of *BMW*, the Majority refused to consider OXY's expected gain or the potential harm of its conduct to other in-state victims.

That holding cannot be reconciled with this Court's approval in *BMW* of the *TXO* analysis that the proper ratio inquiry is "whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred." (Maj. Op., App. 12a, citing *BMW*, 116 S.Ct. at 1602; emphasis in Majority Opinion.) This analysis has many factors including **(1)** the potential harm to the plaintiff [CTR]; **(2)** "the possible harm to other victims that might have resulted if similar future behavior were not deterred", *TXO*, 509 U.S. at 460; **(3)** the "tremendous financial gains that [a defendant] hoped to achieve," *Id.* at 461, and "the amount of money potentially at stake," *Id.* at 462, *see also BMW*, 116 S.Ct. at 1607; **(4)** whether the scheme was part of a larger pattern of fraud and trickery; **(5)** bad faith; and **(6)** the defendant's wealth. *See also Klein*, 44 F.2d at 1505 (citing factors); *TXO*, 509 U.S. at 461-62. *See also* 509 U.S. at 484 (O'Connor, J., dissenting) ("I have no quarrel with the plurality that, ... punitive damages may be predicated on the potential but unrealized harm to the victim, or even on the defendant's anticipated gain. Linking the punitive award to those factors not only substantially furthers the State's weighty interests in deterrence and retribution, but also can be traced well back in the common law.").[15] *BMW* did not change the *TXO* analysis -- it adopted its reasoning. *See* 116 S.Ct. at 1601-03.

Nevertheless, the Majority eschewed any consideration of OXY's actual and potential profit, anticipated financial

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[15] In its Petition for Rehearing of the first opinion, OXY observed that the holding in *TXO* was predicated on TXO's potential profit (*see* Petition for Rehearing filed February 10, 1995, at p. 9), and that profit incentive was a relevant consideration.

gains or harm to other producers (Maj. Op., App. 13a), even though it determined that the record supported a finding of harm to other victims. (Maj. Op., App. 11a.) OXY sought $7 million before trial and $4.25 million at trial on its counterclaim for lost profits. The district court, whose analysis is to be given "the benefit of every doubt," *Gasperini*, 116 S.Ct. at 2223, found substantial actual and potential harm. App. 79a-81a (finding OXY's expected gains to exceed $10 million from CTR alone making the relevant ratio 3 to 1 and as much as $80-$90 million when other producers and the ill-gotten gathering fees were included). The panel previously observed that "the consequences of [OXY's] unchecked behavior could be disastrous." App. 53a. Based on the counterclaim alone, the unanimous panel previously found that the punitive damage award was "actually six times OXY's potential profit." App. 46a-47a.

The Majority's elimination of the *TXO* factors including potential profit or expected financial gains from the ratio analysis had a profound effect on its fact-finding mission. The Majority found that a 6 to 1 ratio was constitutionally permitted under the facts of this case. When the other *TXO* factors are included, the $30 million verdict bears a ratio of less than 6 to 1, well within the ratio approved by this Court in *TXO*.

CONCLUSION

The judgment below is directly contrary to *BMW*, *TXO*, *Gasperini*, and the Seventh and Fourteenth Amendments. The decision is predicated on evidence not introduced at trial. It failed to consider evidence that was before the jury, failed to apply a deferential standard of review, and disallowed consideration of OXY's expected gains as part of the

constitutional analysis. For the foregoing reasons, this Court should grant certiorari and set the case for plenary review.

Respectfully submitted,

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Dated: March 28, 1997.

APPENDIX

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

CONTINENTAL TREND RESOURCES, INC.; HAROLD G. HAMM, TRUSTEE OF THE HAROLD G. HAMM REVOCABLE INTER VIVOS TRUST; GARY H. WRIGHT; CINDY WRIGHT; JEFFREY B. HUME; and FARRAR OIL COMPANY,	)	
Plaintiffs-Appellees/ Cross-Appellants	)	
v.	)	Nos. 92-6350 & 92-6384
OXY USA INC.,	)	(D.C. No. CIV-90-1006-A)
Defendant-Appellant/ Cross-Appellee.	)	(W.D. Oklahoma)

OPINION ON REMAND

Submitted on the briefs:

Theodore B. Olson, Theodore J. Boutrous, Jr., and Mark Snyderman of Gibson, Dunn & Crutcher, Washington, D.C.; David G. Palmer of Gibson, Dunn & Crutcher, Denver, Colorado; W. DeVier Pierson and Mark E. Greenwold of Pierson Semmes and Bemis, Washington, D.C.; Robert F. Hill and Ronald L. Wilcox of Hill & Robbins, Denver, Colorado, for Defendant-Appellant/Cross-Appellee.

Burck Bailey, Eric S. Eissenstat and Dino E. Viera of Fellers, Snider, Blankenship, Bailey & Tippens, Oklahoma City, Oklahoma; Randy Moeder, General Counsel, Continental Trend Resources, Inc., Enid, Oklahoma; Allan DeVore, Oklahoma City, Oklahoma, for Plaintiffs-Appellees/ Cross-Appellants.

Before **McWILLIAMS** and **LOGAN**, Circuit Judges, and **BROWN**, District Judge.*

LOGAN, Circuit Judge.

I

This matter is before us on remand from the United States Supreme Court. In our original opinion, Continental Trend Resources, Inc. v. OXY USA Inc., 44 F.3d 1465 (10th Cir. 1995), we upheld a compensatory damages award of

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* The Honorable Wesley E. Brown, Senior United States District Judge, United States District Court for the District of Kansas, sitting by designation.

$269,000 and a punitive damages award of $30,000,000--based on tort claims for interference with contracts and prospective business advantage-- rejecting various contentions of error made by defendant OXY USA Inc. The Supreme Court vacated our judgment, OXY USA Inc. v. Continental Trend Resources, Inc., 116 S.Ct. 1843 (1996), and remanded for further consideration in light of its recent decision in BMW of North America, Inc. v. Gore, 116 S.Ct. 1589 (1996).

BMW, at the Supreme Court level, involved only whether the punitive damages award at issue there imposed a grossly excessive punishment in violation of the Due Process Clause of the Fourteenth Amendment. We therefore consider the only issue before us on remand to be whether the $30 million punitive damages award in the instant case is grossly excessive in violation of the federal constitution.[1]

In BMW, the Supreme Court held that a $2 million punitive damages award based on BMW's fraud in failing to disclose to a purchaser that his new car had been repainted, was "grossly excessive" and thus unconstitutional. Id. at 1602-04. The BMW opinion expressly set out "to illuminate 'the character of the standard that will identify constitutionally excessive awards' of punitive damages." Id. at 1595 (quoting Honda Motor Co. v. Oberg, 114 S.Ct. 2331, 2335 (1994)). The Court began by pointing out that because a

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[1] Defendant OXY USA Inc. (OXY) has moved to have oral argument, a request opposed by plaintiffs. After review the panel unanimously determined that the "facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument." Fed.R.App.P. 34(a). We therefore deny OXY's request for oral argument.

punitive damages award must be based on the state's legitimate interest in "punishing unlawful conduct and deterring its repetition," a reviewing court must analyze the punitive award in terms of conduct occurring within the state. Id. at 1595-97. Any economic penalties the state inflicts "must be supported by the State's interest in protecting its own consumers and its own economy." Id. at 1597. The BMW Court listed as additional requirements that a person receive fair notice "not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose." Id. at 1598. The Court then provided three "guideposts" for determining whether a defendant had adequate notice of the size of the sanction that a state might impose for a defendant's misconduct. Id. at 1598-99.

The first and "[p]erhaps the most important" guidepost is "the degree of reprehensibility of the defendant's conduct." Id. at 1599 (footnote omitted). "The second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff." Id. at 1601. The third guidepost is a comparison of the punitive damages award with "the civil or criminal penalties that could be imposed for comparable misconduct." Id. at 1603.

In concluding the punitive damages award was grossly excessive, the Court stated that

> [t]he fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business. Indeed, its status as an active participant in the national economy

> implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce.

Id. at 1604. The Court then remanded to the Alabama Supreme Court for it to determine whether there should be a new trial or an independent determination by that court of the amount necessary to vindicate Alabama's economic interests.

BMW is the first case in modern times in which the Supreme Court has found a punitive damages award to be so excessive that it violates the substantive component of the Due Process Clause. See id. at 1604 n.41. In reaching its conclusion the Court clarified in several respects the legal standards to be applied. We now review the Supreme Court's opinion and reanalyze the award in the instant case under these standards.

II

First, the punitive damages award must relate to conduct occurring within the state--here, Oklahoma. A state may not sanction a tortfeasor "with the intent of changing the tortfeasor's lawful conduct in other States." 116 S.Ct. at 1597. Thus, any penalty must be supported by Oklahoma's "interest in protecting its own consumers and its own economy." Id. Of course, unlike in BMW, OXY's conduct in the case before us would be tortious in any state. The BMW Court goes on to state that it "need not consider whether one State may properly attempt to change a tortfeasor's unlawful conduct in another State." Id. at 1598 n.20. Despite this comment we read the opinion to prohibit reliance upon inhibiting unlawful conduct in other states. The Court states that evidence of out-of-state transactions is not

irrelevant; "such evidence is relevant to the determination of the degree of reprehensibility of the defendant's conduct." Id. at 1598 n.21.

In the instant case only acts of OXY within Oklahoma were introduced to support plaintiffs' tort claims. There were references to the effect that OXY had approximately 6,000 contracts like that at issue in this case. There is no indication in the record whether any of the 6,000 contracts were in states other than Oklahoma. OXY had only about 500 contracts at Rodman, however, and plaintiffs had 140 wells connected to the Rodman gas gathering system. The total number of contracts, some of which might have been in other states, could have influenced the amount of the punitive award, as the jury instruction did not limit the jury's consideration to Oklahoma activities.[2] OXY objected to

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[2] The instruction in its entirety is as follows:

> In addition to actual damages, the law permits you, under certain circumstances, to award what are known as "punitive" or "exemplary" damages. Such damages are awarded in proper and specified instances in order to punish a wrongdoer for some extraordinary misconduct, and to serve as an example or warning to others not to engage in similar conduct.
>
> If you find in favor of plaintiffs on their tortious interference with an existing contract claim, their tortious interference with expected contractual business relations claim, or both, then you may award plaintiffs punitive damages. Punitive damages are not to be construed as compensation to the prevailing party but, as stated, punishment for misconduct and as an example to others to deter them from like conduct.

(continued...)

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2 (...continued)

For a party to recover punitive damages, it must be shown that the acts complained of were oppressively, wantonly, or maliciously done. An act is maliciously done if prompted or accompanied by hatred, ill will, or spite toward the injured person individually. Note that malice in this instruction is different from the kind of malice defined under plaintiffs' cause of action. An act is wantonly done if done in a reckless or callous disregard of, or indifference to, the rights of the injured person. An act is oppressively done if done in any way or manner which injures, damages, or otherwise violates the rights of another person with unnecessary harshness or severity, as by misuse or abuse of authority or power, or by taking advantage of some weakness, disability or misfortune of another person.

Although an award of punitive damages is a matter exclusively within the province of the jury, you should always bear in mind the conditions under which punitive damages may be awarded and the purpose for which the law permits an award of punitive damages to be made. In addition, punitive damages must be awarded with sound reason and calm discretion. You should never award punitive damages because of sympathy, bias or prejudice. You are further instructed that there is no exact rule by which to determine the amount of punitive damages. While punitive damages must bear some relation to the injury caused by the offensive conduct as well as the conduct itself, they do not necessarily bear any relation to the amount you awarded as actual damages.

If you find in favor of the plaintiffs on their tortious interference with existing contract claim and

(continued...)

certain aspects of the instruction, see II Appellant's App. 426-37, but not to its failure to limit the jury to consideration of OXY's presence in Oklahoma.

The evidence here focused on OXY's Oklahoma activities, particularly in connection with the Rodman plant. With hindsight provided by the BMW opinion it might have been desirable to instruct the jury to restrict its consideration to Oklahoma's "interest in protecting its own [citizens] and its own economy." 116 S.Ct. at 1597. But we do not think the evidence here required such an instruction.

III

Second, a defendant must receive "fair notice . . . of the conduct that will subject him to punishment." 116 S.Ct. at 1598. BMW did not discuss this requirement except in the context of the severity of the penalty the defendant might expect.

In the instant case we have no difficulty with this requirement. It has long been established in Oklahoma and

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2 (...continued)

> tortious interference with expected contractual business relations claim, and if you should further find that in committing the acts complained of, the act was done oppressively, wantonly, or maliciously, then you may award punitive damages in such an amount as you deem is warranted by the evidence.
>
> In assessing punitive damages, you may consider defendant's net worth as one of many factors.

II Appellant's App. 528-30.

elsewhere that tortious behavior that is particularly egregious will warrant punitive damages. See, e.g., Marshall v. El Paso Natural Gas Co., 874 F.2d 1373 (10th Cir. 1989); Timmons v. Royal Globe Ins. Co., 653 P.2d 907 (Okla. 1982). An Oklahoma statute in force when the instant case arose permitted punitive damages to exceed the amount of the actual damages if the judge made a finding of "clear and convincing evidence that the defendant is guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed." Okla. Stat. tit. 23, § 9 (1986). There is no question but that OXY had fair notice that punitive damages could be awarded if plaintiffs proved the contentions in their complaint to the satisfaction of the jury.

IV

Third, defendant must receive "fair notice . . . of the severity of the penalty that a State may impose." 116 S.Ct. at 1598. It is with respect to this requirement that the Supreme Court set forth its three "guideposts:" (1) the degree of reprehensibility of the defendant's conduct, (2) the ratio of the punitive award to the actual harm inflicted on the plaintiff, and (3) the comparison between the punitive award and the civil or criminal penalties that could be imposed for comparable misconduct.

A

The Supreme Court tagged as "[p]erhaps the most important indicium of the reasonableness of a punitive damages award" "the degree of reprehensibility of the defendant's conduct." Id. at 1599. In reviewing the

enormity of an offense we must accept that "some wrongs are more blameworthy than others." Id. Purely economic harm may warrant less punishment than harm to the health or safety of individuals. But "infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, or when the target is financially vulnerable, can warrant a substantial penalty." Id. (citations omitted).

Also relevant is whether "a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful." Id. "[A] recidivist may be punished more severely than a first offender." Id. Out-of-state acts may be used to show the degree of reprehensibility of a defendant's conduct. Id. at 1598 n.21. Other circumstances to consider include whether the defendant's conduct is lawful in another state, and whether the defendant "persisted in a course of conduct after it had been adjudged unlawful" on at least one occasion. Id. at 1601. "[T]he omission of a material fact may be less reprehensible than a deliberate false statement." Id. Thus, among the questions we ask are whether a defendant's behavior: causes economic rather than physical harm; would be considered unlawful in all states; involves repeated acts rather than a single one; is intentional; involves deliberate false statements rather than omissions; and is aimed at a vulnerable target.

In our original opinion we rejected OXY's assertion that a purely economic injury necessarily provides less support for a substantial punitive damages award than a personal injury. See 44 F.3d at 1478. Although the BMW Court stated that certain inflictions of economic injury would warrant a "substantial penalty," 116 S.Ct. at 1599, it does appear to regard torts causing only economic injury as less worthy of large punitive damages awards than torts inflicting

injuries to health or safety. The instant case contains almost all of the other indicia of reprehensibility: OXY's actions, as found by the jury, would be condemned universally. The jury and the district court found that OXY intentionally interfered with plaintiffs' existing and prospective contracts; there was evidence that OXY withheld payments owed to plaintiffs to induce them to change their position and altered internal documents containing statements damaging to OXY. See 44 F.3d at 1479; VIII Appellant's App. 2738-39.

OXY argues that it did not engage in repeated misconduct toward plaintiffs, or with other producers; but the record contains evidence that OXY used some of the same tactics with other producers in the same gas field as plaintiffs. See VIII Appellant's App. 2738-39; I Appellees' App. 131, 260; II id. at 633-40. Further, the district court observed that the jury was "visibly reactive to" the testimony of OXY's corporate representative that "'we cannot let [plaintiffs] get away with this or everybody else will try to do it [bypass Rodman].' It was a 'the natives are restless we better get out there and subdue them' kind [of] presentation." VIII Appellant's App. 2738-39. The district court noted that "[c]oercing weaker competitors to keep them in their place was OXY's method of conducting business," 810 F.Supp. at 1530; see also VII Appellee's App. 2457-59, and that "[t]he jury was obviously moved by the repugnancy of the totality of OXY's conduct." 810 F.Supp. at 1530. There is evidence in the record to support plaintiffs' financial vulnerability; the district court noted plaintiffs' claim that their business was almost decimated by OXY's actions. See id. at 1528-31.

There is sufficient evidence in the record of the reprehensibility of OXY's conduct to support a "substantial penalty." The appropriate penalty is no doubt below what

would be justified if OXY's conduct caused loss of life, widespread health hazards, or major environmental injury. But this is not a case like BMW where the Court found "no deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive." Id. at 1601.

B

The ratio of punitive damages "to the actual harm inflicted on the plaintiff" is the second guidepost. 116 S.Ct. at 1601. The BMW Court referred to its previous statement that a punitive award more than four times the compensatory award was "'close to the line.'" See id. at 1602 (quoting Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23-24 (1991)). The Court then acknowledged that TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993), had refined this analysis, to make the proper inquiry "'"whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred."'" 116 S.Ct. at 1602 (quoting TXO, 509 U.S. at 460) (quoting Haslip, 499 U.S. at 21). In TXO the Supreme Court upheld a punitive award 526 times greater than the compensatory award. But in BMW it justified that decision by stating that "in upholding the $10 million award in TXO, we relied on the difference between that figure and the harm to the victim that would have ensued if the tortious plan had succeeded. That difference suggested that the relevant ratio was not more than 10 to 1." Id. (emphasis added).

The Court acknowledged that "low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic

damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine." Id. at 1602. In rejecting the award in BMW the Court noted that there was "no suggestion that [the plaintiff] or any other BMW purchaser was threatened with any additional potential harm." Id.

From this discussion we surmise that in economic injury cases if the damages are significant and the injury not hard to detect, the ratio of punitive damages to the harm generally cannot exceed a ten to one ratio. In figuring harm both actual and potential harm may be considered. But it must be harm to these plaintiffs, not to others. The BMW opinion is somewhat confusing by its several references discussing ratios in the context of all fourteen of the Alabama purchasers of repainted new cars rather than to the single plaintiff in that case. But the BMW opinion stated more than once that the relevant ratio was "to the actual harm inflicted on the plaintiff." Id. at 1601; see also id. at 1602 ("harm to the victim"); id. at n.34 ("potential loss to respondents") (quoting TXO, 509 U.S. at 462).

The BMW case itself might qualify for a greater ratio than ten to one, because the actual damages were small, only $4,000, even though there was no additional potential harm to the plaintiff. But in the case before us the jury found compensatory damages of $269,000, a significant sum. And the potential damages to these plaintiffs had OXY's course of action succeeded was substantially more.

Plaintiffs produced expert evidence not focused specifically upon their potential loss, but which would support a jury finding of approximately $1,000,000 in combined actual

and potential loss. The affidavit of expert John Brickhill related that seventy-nine producing wells of plaintiffs were attached to the Rodman gathering system and averaged 44.5 Mcf production per day. II Appellees' App. 653, 669. He projected production for three years, apparently the average life of these wells. Id. at 666 ("production from wells in the Sooner Trend typically declines 50% or more the first year and 20% to 47% annually over the life of the reserves"). He also estimated the penalty for bypassing the Rodman plant at twenty cents per Mcf. Id. at 651-52. Using those figures (79 x 44.5 Mcf per day x 3 years x .20 per Mcf) the potential future cost to plaintiffs would be $769,895. That amount added to the $269,000 compensatory damages awarded for past harm would exceed $1,000,000.

The jury could have arrived at a higher figure using OXY's evidence on its counterclaim. One of its experts, Dr. Carlos M. Royo, estimated the post-1990 production from plaintiffs' wells attached to the Rodman system over the wells' remaining life at 8,514,758 Mcf. VI Appellees' App. 2031. OXY's expert, John Wilson, using this figure, asserted that OXY was deprived of "lost proceeds" of $3,242,800. VIII id. at 2643-44, 2718. OXY sought this sum for its damages, but its expert did not reduce the figure by any expenses of operating the Rodman plant. Id. at 2644. There was other evidence, however, that operating expenses plus depreciation would be in the range of eighteen cents per Mcf. See III id. at 849; V id. at 1513. There were other indications that eighteen to twenty cents per Mcf was a reasonable cost. See III id. at 1048; V id. at 1573; VII id. at 2330. Subtracting eighteen cents per Mcf from $3,242,800 would give a potential future profit figure of $1,710,144. When added to the actual damages figure awarded by the jury the

total actual and potential profit had OXY succeeded would be near $2,000,000.

C

The third "indicium of excessiveness" is provided by "[c]omparing the punitive damages award and the civil or criminal penalties" for comparable misconduct. 116 S.Ct. at 1603. This was relatively straightforward in BMW, where Alabama and many states had limited criminal and civil fines for deceptive trade practices and other offenses similar to those at issue there.

The BMW Court determined that the punitive award was grossly in excess of civil or criminal penalties that could have been imposed on the defendant for similar conduct. OXY argues that likewise, when the instant case arose no Oklahoma statutes provided fines for similar conduct that would even approach $30 million. See, e.g., 52 Okla. Stat. § 47.6A (1984) (penalty for violating Hazardous Liquid Transportation System Safety Act no more than $1,000 a day up to maximum of $200,000); 15 Okla. Stat. § 761.1(b) (1988) (unconscionable violation of Consumer Protection Act provides penalty of no more than $2,000). OXY also asserts that if plaintiffs had proven their antitrust claim (which was dismissed by the district court) the penalty would have been only $538,000. See 15 U.S.C. § 15(a) (treble damages in antitrust cases).

Plaintiffs argue that OXY's "scheme" affected inter-state commerce and could have been punished under federal racketeering laws with lengthy prison sentences and multimillion-dollar fines, but we see no basis for those criminal penalties. There was evidence, however, of

corporate employees altering documents to further OXY's interest. In such circumstances OXY would be liable for the offenses of its agents. See USSG ch. 8, intro. comment. Generally corporations are punished by restitution and fines. Id. §§ 8B1.1, 8C1.1. Analogous crimes, for purposes of determining a proper fine, would be fraud, deceit and forgery, under which the court would determine the base offense level, see id. § 2F1.1, for which OXY could be subject to a very large fine. Id. § 8C2.4.

The analysis of the potential penalties highlights one of the many factual differences between BMW and the instant case; OXY's misconduct involved a violation of common law tort duties that do not lend themselves to a comparison with statutory penalties. The fundamental question is whether OXY had reasonable notice that its tortious interference with contracts and prospective business advantage could result in such a large punitive award. Plaintiffs point to cases from other states involving very large punitive awards. See, e.g., Texaco, Inc. v. Penzoil Co., 729 S.W.2d 768 (Tex. App. 1987), cert. dismissed, 485 U.S. 994 (1988) ($1 billion tortious interference); Central Tele. Inc. v. TCI Cablevision, Inc., 800 F.2d 711, 732 (8th Cir. 1986), cert. denied, 480 U.S. 910 (1987) ($25 million tortious interference). Those cases, together with cases involving large awards in Oklahoma, see, e.g., Timmons v. Royal Globe Ins. Co., 653 P.2d 907, 909, 919 (Okla. 1982) (remittitur to $1.5 million punitives; one to four ratio); Marshall v. El Paso Natural Gas Co., 874 F.2d 1373 (10th Cir. 1989) ($5 million in oil and gas well capping case), provided sufficient notice to OXY of the potential for large punitive awards.

V

Finally, we note that the Supreme Court in BMW downplayed the defendant's wealth as a justification for increasing punitive damages, by emphasizing that its status as a large active participant in the national economy "implicates the federal interest" in prohibiting states from unduly burdening interstate commerce and "imposing its regulatory policies on the entire Nation." Id. at 1604. The BMW Court also places in the constitutional calculus the question of the minimum level of penalty necessary to achieve the state's goal of deterrence. See 116 S.Ct. at 1603 ("The sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal. The fact that a multimillion dollar penalty prompted a change in policy sheds no light on the question whether a lesser deterrent would have adequately protected the interests of Alabama consumers.").

OXY argues that in our previous opinion we upheld the punitive award because of its wealth, and that BMW "teaches that net worth will not sustain the gross imbalance between punitive and actual damages" in the instant case. See Brief of OXY USA Inc. on Remand from the United States Supreme Court at 24. We do not read the Court's statements to mean that the wealth of the defendant is irrelevant. From the Court's statements we conclude that a large punitive award against a large corporate defendant may not be upheld on the basis that it is only one percent of its net worth or a week's corporate profits. Yet wealth must remain relevant, because $50,000 may be awesome punishment for an impecunious individual defendant but wholly insufficient to influence the behavior of a prosperous

corporation. The Supreme Court's opinion seems to ask for the least punishment that will change future behavior; but that is difficult to apply as a constitutional principle. Still, in commercial litigation like that before us the actual and potential damages are likely to be substantial, and thus punitive damages awarded on even a modest multiplier generally will be enough to gain the defendant's attention and alter its future behavior. This is especially so considering the probability that the defendant's continued misbehavior surely would generate additional lawsuits.

We mention another factor relevant to wealth that we believe may be considered in setting and reviewing punitive awards in particular circumstances. A rich defendant may act oppressively and force or prolong litigation simply because it can afford to do so and a plaintiff may not be able to bear the costs and the delay. We have held that the costs of litigation to vindicate rights is an appropriate element to consider in justifying a punitive damages award. O'Gilvie v. International Playtex, Inc., 821 F.2d 1438, 1447 (10th Cir. 1987), cert. denied, 486 U.S. 1032 (1988).

In the instant record there is evidence that OXY thought it could impose its corporate will on plaintiffs. To secure compensatory damages of $269,000 plaintiffs had to engage in litigation resulting in a three-week trial and an appellate record of approximately 7,000 pages. They had to defend the jury's verdict in post-trial district court proceedings, in an appeal to this court and to the Supreme Court, and again in this court on remand. On any reasonable hourly fee basis plaintiffs' legal costs no doubt exceed their compensatory damages award. Nothing in BMW would appear to prohibit consideration of the cost of those legal

proceedings in determining the constitutionally permissible limits on the punitive damages award.

VI

In summary, we are satisfied that a significant punitive damages award against OXY is proper and constitutionally permissible. With the guidance of the BMW opinion, however, we conclude that $30,000,000 exceeds the constitutional limit. The harm in this case, though egregious, was entirely economic, and thus less worthy of punishment than harm to health and safety. Further, the ratio between the award and the harm to these plaintiffs--both actual and potential--is too large. OXY's wealth is not irrelevant, but $30,000,000 is far more than is necessary to secure its attention and modify its behavior in Oklahoma.

In BMW the Supreme Court remanded to the Alabama Supreme Court for it to determine whether to order a new trial or make its own determination "of the award necessary to vindicate the economic interests of Alabama." 116 S.Ct. at 1604. OXY asks this court to either "set aside or significantly reduce[ ]" the punitive damages award. Brief of OXY USA Inc. on Remand from the United States Supreme Court at 25. The question thus becomes whether we should remand to the district court to determine the amount of a remittitur or whether we should determine the amount of remittitur ourselves. Plaintiffs cite Gasperini v. Center for Humanities, Inc., 116 S.Ct. 2211 (1996), a post-BMW decision that it argues limits our options. Gasperini held that in federal court diversity cases, applying state law, the Seventh Amendment prohibits the Court of Appeals from redetermining a fact issue decided by a jury. Rather the appeals court must apply an abuse of discretion

standard to the district court's post-trial ruling, and if it reverses must remand the case to the district court so that it may revisit its prior ruling. Id. at 2225. Compensatory damages were at issue in Gasperini, but the decision would apply the same standard to punitive damage awards. See id. at 2223 n.18; see also id. at 2221 n.12; id. at 2228 n.4 (Stevens, J., dissenting).

In the case before us, however, we would not be redetermining a fact issue found by a jury. We ascertain no error of law in the instructions to the jury, nor in the jury's fact-finding. Rather we have concluded, aided by the intervening BMW case, that the jury's punitive damages award was so excessive it violated the substantive element of the Due Process Clause of the Federal Constitution. This is a federal constitutional issue. See Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state.") (emphasis added); see also Gasperini, 116 S.Ct. at 2235 (Scalia, J., dissenting) (asserting that "the level of punitive damages is not really a 'fact' 'tried' by the jury"). We do not believe Gasperini prevents us from determining in the first instance the amount of remittitur, because the issue of how much of the $30,000,000 award the United States Constitution allows is one of constitutional fact that the appellate courts have the power to decide. See Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 501 n.17 (1984) ("Regarding certain largely factual questions in some areas of the law, the stakes . . . are too great to entrust them finally to the judgment of the trier of fact.").

We now must determine the maximum constitutionally permissible punitive award based on our review of the record.

This obviously is a difficult decision; we must arrive at a precise dollar figure by applying guidelines that contain no absolutes to facts that provide only imprecise potential damage amounts. Nevertheless, using our best judgment we determine that $6,000,000 is the maximum constitutionally permissible punitive damages award justified by the facts of this case. This amount is approximately six times the actual and potential damages plaintiffs suffered according to our best estimate of their proof. Thus it is within the range of a one to four to a one to ten ratio we believe BMW imposes in cases such as this--involving commercial litigation with substantial actual and potential damages. If we use OXY's own figures based upon its unsuccessful counterclaim, the award is only about three times our calculation of actual and potential damages, and only about twice what OXY attempted to establish on its counterclaim.

The $6,000,000 figure is sufficient to obtain OXY's attention, regardless of its wealth, and enough, we believe, to change its behavior in Oklahoma oil and gas fields. The figure is sufficient to cover plaintiffs' reasonable costs of litigation with enough left over to reward plaintiffs for pursuing a case the jury obviously thought justified significant punishment of OXY's behavior.

Thus, we order a remittitur reducing the punitive damages award to $6,000,000. Should plaintiffs decline to accept the reduced judgment, the district court is directed to grant a new trial limited to the punitive damages issue. See Mason v. Texaco, Inc., 948 F.2d 1546, 1561 (10th Cir. 1991), cert. denied, 504 U.S. 910 (1992); see also Morgan v. Woessner, 997 F.2d 1244, 1258 (9th Cir. 1993) ("To avoid any conflict with the Seventh Amendment, the preferable choice is to afford the party awarded the grossly excessive

punitive damages, whether that is determined by a trial court or appellate court, the option of either accepting the remittitur of the punitive damages award or a new trial on that issue."), cert. dismissed, 510 U.S. 1033 (1994).

We AFFIRM and reinstate the district court's judgment, provided that plaintiffs accept a reduction in the punitive damages award to $6,000,000. We REMAND to the district court for further proceedings consistent with this opinion.

BROWN, Senior District Judge, Dissenting:

I agree that the majority opinion fully and accurately sets out the factual background involved in this appeal. I also agree that in reconsidering our prior ruling in light of BMW of North America, Inc. v. Gore, 517 U.S. , 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), as we have been directed to do by the Supreme Court upon remand, the majority opinion has thoroughly and correctly analyzed the "guidelines" that are to be found in that opinion. I must respectfully dissent, however, from the majority's ultimate conclusion that $6,000,000 is the maximum constitutionally permissible punitive damage award under the facts and law which govern this case.

It seems to me that our difficulty in applying the precepts of the BMW case stems from the factual aspect of that case which I find to be clearly distinguishable. It seems to me that the primary motivating factors in BMW were that there were no "aggravating factors" or particular reprehensible conduct by BMW present in the case, that the award was 500 times the amount of the customer's actual harm, and

that under Alabama law there was a lack of adequate "reasonable constraints" to guide the court and jury in determining the reasonableness of punitive awards.[3]

In the first instance, the award of punitive damages against OXY in our case did not in any way approach the 500 to 1 ratio which was so criticized in BMW.

Secondly, while the wrongful acts of BMW and OXY USA both resulted in economic injury to the complaining parties, the nature of the two wrongs is quite different. While BMW was found to be involved in what may be termed "deceptive trade practices" affecting the value of a new car and resultant damage to consumers, OXY USA was engaged in intentional conduct which was "particularly egregious" conduct which was deliberate and repetitive and designed to destroy a vulnerable competitor. As the majority has noted, the trial court found that the jury "visibly reacted" to OXY's corporate witness, and that "[t]he jury was obviously moved by the repugnancy of the totality of OXY's conduct." 810 F.Supp. at 1530.

Finally, and perhaps of most importance to me is the fact that, unlike Alabama, the State of Oklahoma has established an elaborate system of checks upon the discretion of courts and juries in the imposition of punitive damage

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[3] This aspect of Alabama law was discussed at length in the concurring opinion of Justice Breyer (O'Connor and Souter joining), 116 S.Ct. at 1604 et seq., 134 L.Ed. 2d at pp. 833 et seq.

awards. See discussion, Capstick v. Allstate Ins. Co., 998 F.2d 810, at pp. 816 et seq., (10th Cir. 1993).[4]

In our prior opinion, this panel determined that the original award of $30,000,000, when examined from the perspective of the facts surrounding OXY's conduct and of what would be necessary to punish a very wealthy corporation and to deter similar conduct, was "not necessarily a shocking figure"; and we declined to disturb the jury's award at that time.

In this opinion after remand, the majority has noted that plaintiffs produced evidence which would support a jury finding of approximately $1,000,000 in actual and potential loss, while OXY's own evidence would support a higher figure of $2,000,000. Since the majority further noted that "in economic injury cases if the damages are significant and the injury not hard to detect, the ratio of punitive damages to the harm generally cannot exceed a ten to one ratio," these damage figures alone would justify a punitive award of between $10 and $20 million. When the additional factor of the extent and nature of OXY's income and net worth is added as a consideration, one begins to approach the original jury award of $30 million, and this judge can only conclude that an award of not less than $20 million would be permis-

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[4] In Oklahoma, a plaintiff is entitled to recover punitive damages in excess of his actual damages if the trial court determines prior to submission of the case, "that there is clear and convincing evidence that the defendant is guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed," in which case the jury may award damages "for the sake of example, and by way of punishing the defendant, and the percentage limitation on such damages . . . shall not apply." 998 F.2d at 817.

sible and required under the circumstances found in this record without violation to the concepts of due process.[5]

In any event, this case clearly illustrates the difficulties which arise when the ultimate decision of whether to impose punitive damages, and the amount of those damages is taken from the discretion of a jury impanelled and instructed in accordance with the strict guidelines imposed by Oklahoma law.[6]

In my opinion, the BMW case does not apply to the facts and circumstances of this case, and we should reaffirm the punitive award found appropriate by the Oklahoma jury. If BMW does apply, then to give some credence to the Okla-

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[5] In our previous opinion in this case, we noted that OXY claimed that the $30 million punitive award was based upon passion and prejudice because in plaintiff's closing argument it was pointed out that OXY earned over $36 million a week. We there ruled that ". . . we cannot conclude on the record as a whole that the jury acted out of passion or prejudice."

[6] It should be noted that in remanding the BMW case to the state court, the Supreme Court specifically noted that

> "As in Haslip, we are not prepared to draw a bright line marking the limits of a constitutionally acceptable punitive damages award. Unlike that case, however, we are fully convinced that the grossly excessive award imposed in this case transcends the constitutional limit. Whether the appropriate remedy requires a new trial or merely an independent determination by the Alabama Supreme Court of the award necessary to vindicate the economic interests of Alabama consumers is a matter that should be addressed by the state court in the first instance." (116 S.Ct. at 1604, 134 L.Ed.2d at 833.)

homa jury's conclusions, we certainly should not reduce the punitive damage award below the $20 million figure disclosed by the evidence.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CONTINENTAL TREND RESOURCES, INC., et al., Plaintiffs-Appellees/ Cross-Appellants, v. OXY USA, INC., Defendant-Appellant/ Cross-Appellee.	Nos. 92-6350 92-6384 DC No. CIV-90-1006-A

ORDER

Filed January 29, 1997

Before **McWILLIAMS** and **LOGAN**, Circuit Judges, and **BROWN**, District Judge*.

* The Honorable Wesley E. Brown of the United States District Court for the District of Kansas, sitting by designation.

The court has for consideration the following:

1. Appellees/Cross-Appellants' (Continental [CTR], et al.) petition for rehearing and suggestion for rehearing en banc;

2. Appellant/Cross-Appellee's (Oxy) response;

3. CTR's motion to file a reply to Oxy's response brief;

4. Oxy's objection to CTR's motion to file a reply, and request to file a surreply if CTR's motion to file a reply is granted.

CTR's Motion to file a reply to Oxy's response is granted.

Oxy's motion to file a surreply is denied.

CTR's petition for rehearing is denied by the panel that rendered the decision. Judge Brown voted to grant rehearing. The petition for hearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed.R.App.P. 35. No member of the panel and no judge in regular active service on the court requested that the court be polled on rehearing en banc so the suggestion for rehearing is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: Opal A. Carter
Deputy Clerk

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. 94-1838

OXY USA INC.,

Petitioner

v.

CONTINENTAL TREND RESOURCES, INC., ET AL.

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Tenth Circuit.

THIS CAUSE having been submitted on the petition for a writ of certiorari and response thereto.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment on the above court in this case is vacated with costs and the cause is remanded to the United States Court of Appeals for the Tenth Circuit for further consideration in light of *BMW of North America, Inc. v. Gore*, 517 U.S. ___ (1996).

IT IS FURTHER ORDERED that the petitioner OXY USA, Inc. recover from Continental Trend Resources, Inc., et al., Three Hundred Dollars ($300.00) for its costs herein expended.

May 28, 1996

Clerk's costs: $300.00

APPENDIX D

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

CONTINENTAL TREND RESOURCES, INC.; HAROLD G. HAMM, Trustee of the Harold G. Hamm Revocable Inter Vivos Trust; GARY H. WRIGHT; CINDY WRIGHT; JEFFREY B. HUME; FARRAR OIL COMPANY,

Plaintiffs-Appellees,

v. No. 92-6350

OXY USA, INC.,

Defendant-Appellant

and

WILLIAMS NATURAL GAS COMPANY,

Defendant.

CONTINENTAL TREND RESOURCES, INC.; HAROLD G. HAMM, Trustee of the Harold G. Hamm Revocable Inter Vivos Trust; GARY H. WRIGHT; CINDY WRIGHT; JEFFREY B. HUME; FARRAR OIL COMPANY,

Plaintiffs-Appellants,

No. 92-6384

v.

OXY USA INC. and WILLIAMS NATURAL GAS COMPANY,)

Defendants-Appellees.)

Appeals from the United States District Court for the Western District of Oklahoma (D.C. No. CIV-90-1006-A)

FILED
Jan. 12, 1995

Before McWILLIAMS and LOGAN, Circuit Judges, and BROWN, District Judge.*

LOGAN, Circuit Judge.

Defendant OXY USA Inc. (OXY) appeals (No. 92-6350) a judgment entered after a jury verdict for plaintiffs[1] on their state tortious interference with contract claims and on OXY's counterclaim for breach of contract. Plaintiffs cross-appeal (No. 92-6384) the court's entry of summary judgment for OXY

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*The Honorable Wesley E. Brown, Senior United States District Judge, United States District Court for the District of Kansas, sitting by designation.

[1]Plaintiffs are Continental Trend Resources, Inc., Harold G. Hamm, Trustee of the Harold G. Hamm Revocable Inter Vivos Trust, Gary H. Wright, Cindy Wright, Jeffrey B. Hume and Farrar Oil Company.

on plaintiffs' federal antitrust claims and its denying plaintiffs attorney's fees for defending against OXY's counterclaim.

OXY first argues that we must reverse the tortious interference verdict because the district court erred in instructing the jury on the elements of tortious interference with existing and prospective contracts. OXY secondly argues that we must reverse the $30,000,000 punitive damages awarded in connection with the tortious interference claim because: (1) the jury instructions were erroneous, (2) the jury was permitted to award punitive damages for conduct (breach of contract and contract damages) for which punitive damages are not permitted under state law, (3) the procedures followed by the district court deprived OXY of due process of law, and (4) the punitive damages award was so excessive that it violated substantive due process and Oklahoma law. Alternatively, OXY asks us to order a remittitur. OXY finally argues that it is entitled to a new trial on its counterclaims for breach of contract because the court failed to properly instruct the jury.

Plaintiffs assert in their cross-appeal that the district court erred in dismissing their antitrust claims and in denying their attorney's fees for defending against OXY's breach of contract counterclaim.

I
Background

Plaintiffs own interests in gas wells in the Sooner Trend, a four-county area in Oklahoma. About 140 of these wells were connected to the Rodman gas gathering system owned by defendant Williams Natural Gas Company (WNG).[2] The Rodman system collected natural gas from wells in the Sooner Trend and transported it to the Rodman gas processing plant. OXY was part owner of the Rodman processing plant and

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[2]In 1985, plaintiffs acquired a number of contracts giving them an interest in wells connected to the Rodman system. These contracts included gas purchase contracts with WNG that were allegedly coterminous with gas processing agreements with OXY and gas purchase contracts with OXY.

operated both the plant and the gathering system.[3] The Rodman plant extracted natural gas liquids and dehydrated and compressed gas from the Rodman gathering system; the tailgate of the Rodman Plant fed into WNG's high pressure interstate pipeline. WNG did not own any facilities to compress or dehydrate gas.[4] Plaintiffs' gas required some dehydration in order to meet the WNG pipeline's quality requirements and compression to enter WNG's high pressure line.

Before the mid-1980s all of the gas on the Rodman system was sold to WNG for resale to its customers. In July 1988 WNG began offering gathering and transportation services on the Rodman system as an open access transporter pursuant to the Federal Energy Regulatory Commission (FERC) Order No. 436, which enabled gas producers to deal directly with gas buyers rather than through intermediary interstate pipelines. An open access transporter is required to

> provide access to all shippers on a "first-come, first-served" basis, even if the shipper intends to compete with the pipeline company in the sale of gas. . . . The purpose . . . is to increase downstream competition in natural gas sales by ensuring that sellers who do not transport their own gas have access to transportation facilities.

Colorado Interstate Gas Co. v. FERC, 890 F.2d 1121, 1123 (10th Cir. 1989) (citations omitted); *see also Northern Natural Gas Co. (Div. of Enron Corp.) v. FERC*, 929 F.2d 1261, 1263-

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[3]WNG owned the gathering lines; OXY operated and maintained those lines. This arrangement originated with the predecessors in interest of OXY and WNG to avoid uneconomical gas processing at the Rodman plant.

[4]After the district court's entry of summary judgment on the antitrust claims, WNG and OXY transferred their interests in the Rodman gathering system to Trident NGL, Inc. and Oryx Energy Co., and the Federal Energy Regulatory Corporation (FERC) entered an order approving abandonment of the Rodman gathering system from FERC jurisdiction. *Williams Natural Gas Co.*, 61 F.E.R.C. ¶ 61,285 (1992).

64 (8th Cir.), *cert. denied*, 112 S. Ct. 169 (1991) (open access policy was means by which FERC sought to increase competition in the market for natural gas). WNG's tariff set forth the terms and conditions of service, including the fee for transporting gas.

In 1989, plaintiffs asserted that their gas purchase and processing contracts with defendants had expired or terminated[5] and sought open access so that they could sell gas to entities other than WNG and OXY. However, WNG denied plaintiffs' requests to transport gas to other parties. Plaintiffs assert that OXY and WNG told them that bypassing the Rodman plant was impossible.

Plaintiffs then filed the instant suit in June 1990, alleging that OXY and WNG violated federal and state antitrust laws by monopolizing and conspiring to monopolize transportation and processing of gas with contracts tying gas processing to gas transportation, and by denying plaintiffs access to essential facilities. Plaintiffs also contended that defendants tortiously interfered with plaintiffs' existing and prospective contracts under Oklahoma law. In support of the tort claim, plaintiffs alleged that although OXY knew that its gas purchase or processing contracts with plaintiff had expired or were invalid, OXY refused to allow plaintiffs to utilize the Rodman system to market gas, and shut-in plaintiffs' wells, stopping their flow of gas. Plaintiffs also claimed that OXY contacted potential purchasers of plaintiffs' gas, and falsely asserted OXY had contractual rights to that gas. OXY counterclaimed, alleging conversion and that plaintiffs breached their contractual duties to OXY by attempting to sell gas to third parties. In its counterclaims OXY asserted that its contracts with plaintiffs continued to be valid.

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[5]In 1989, plaintiffs brought suit in Oklahoma state court, alleging that OXY had breached four groups of contracts—the Mosier Farm, the casinghead gas, the processing agreements, and the Henneman contracts—and requesting, among other relief, formal rescission of those contracts and damages. There is no indication in the record that this litigation was other than pending at the time of trial.

The district court granted defendants' summary judgment motion on the federal and state antitrust claims, but denied summary judgment on the tortious interference state claims.[6] The remaining claims and counterclaims were then tried to a jury.

OXY and WNG moved for a directed verdict at the close of plaintiffs' evidence on the tortious interference claims. The district court granted WNG's motion but denied OXY's, except as to certain damages. The district court also denied plaintiffs' motion for a directed verdict on OXY's contract counterclaims, except as to certain wells. At the conclusion of the evidence the district court found that there was clear and convincing evidence on which OXY could be found liable for punitive damages under Okla. Stat. tit. 23, § 9, and submitted the punitive damages question to the jury.[7]

The jury rendered a general verdict for plaintiffs on the tortious interference claim against OXY and awarded compensatory damages of $269,000[8] and punitive damages of $30 million. The jury returned a general verdict against OXY on its contract counterclaims. The district court denied OXY's motions to alter or amend the judgment, for remittitur, for

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[6]The district court also denied plaintiffs' motion for partial scary judgment on the validity of certain processing agreements and a November 3, 1987 letter agreement.

[7]Okla. Stat. tit. 23, § 9 provides that punitive damages are limited to the amount of actual damages unless before submitting the case to the jury the judge makes a finding to "that there is clear and convincing evidence that the defendant is guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed."

[8]The district court permitted plaintiffs to present two categories of damages to the jury: (1) market value damages" of approximately $90,000 for gas that actually flowed but was sold at a lower price than plaintiffs claimed they could have received; and (2) "shut in damages" of approximately $178,000 for gas that did not flow. *See* VII Appellant's App. 2382, 2420-21.

judgment notwithstanding the verdict, or for new trial. These appeals followed.

II
Tortious Interference Claims

OXY asserts that we must reverse the jury verdict on tortious interference because it was based on improper jury instructions. Although in a diversity case the substance of jury instructions is a matter of state law, the acceptance or refusal of a tendered instruction is a procedural matter governed by federal law. *Farrell v. Klein Tools, Inc.*, 866 F.2d 1294, 1296 (10th Cir. 1989). In reviewing jury instructions we consider them as a whole and ask whether they accurately stated the governing law and provided the jury with an ample understanding of the issues and the applicable standards. *Brown v. Wal-Mart Stores, Inc.*, 11 F.3d 1559, 1564 (10th Cir. 1993). The controlling questions are whether the jury was misled and whether the instructions provided an understanding of the issues and explained the jury's duty to determine those issues. *Estate of Korf v. A.O. Smith Harvestore Prods, Inc.*, 917 F.2d 480, 484 (10th Cir. 1990). We will reverse only if an erroneous instruction is prejudicial in light of the record as a whole. *Mason v. Texaco. Inc.*, 862 F.2d 242, 246 (10th Cir. 1988) (*Mason I*).

Oklahoma law requires a party claiming tortious interference with contract or business relations to prove that (1) it had a business or contractual right that was interfered with, (2) the interference was malicious and wrongful (not justified, privileged, or excusable), and (3) the interference proximately caused damage. *James Energy Co. v. HCG Energy Corp.*, 847 P.2d 333, 340 (Okla. 1993); *Waggoner v. Town & Country Mobile Homes, Inc.*, 808 P.2d 649, 654 (Okla. 1990), *limited on other grounds by Dutsch v. Sea Ray Boats, Inc.*, 845 P.2d 187, 193 (Okla. 1992). For purposes of this appeal we accept plaintiffs' proposition that the plaintiff in a prospective contractual relations case must show absence of privilege or

justification.[9] *See Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1505-07 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1048 (1993). We review OXY's specific arguments with regard to the jury instructions within this Oklahoma law framework.

OXY asserts that the district court erred in refusing to instruct the jury that (1) OXY's refusal to deal could not constitute tortious interference; (2) communication of truthful information could not constitute tortious interference; and (3) performance of a contract is relevant to the interpretation and validity of the contract. OXY relies in part on Supplemental jury instructions that it claims to have tendered to the district court before the close of the trial; however, these supplemental jury instructions were not part of the district court record. Our review of the tortious interference jury instructions does not include the proposed supplemental instructions, which are not part of the district court or appellate record.[10]

OXY first claims the district court erred in refusing to instruct the jury that any refusal to deal by OXY could not constitute tortious interference. OXY specifically objected to the instructions given, preserving this issue for appeal. *See* Fed. R. Civ. P. 51; *Weir v. Federal Ins. Co.*, 811 F.2d 1387, 1390 (10th Cir. 1987) (purpose of Fed. R. Civ. P. 51 is to "provide[] the

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[9]Defendants point out that no Oklahoma case has yet held a party liable for tortious interference with prospective contractual relations.

[10]Plaintiffs filed a motion to strike portions of the Supplemental Appendix to Reply Brief of Appellant OXY USA, Inc. and Response Brief of Cross-Appellees OXY and Williams Natural Gas Co. (supplemental appendix) because they included materials not in the district court record. OXY moved to supplement the record approximately 21 months after the trial. The district court denied that motion, stating "[i]t is simply too late in the game to add these [proposed jury] instructions to the record. Defendant has previously taken the position, adverse to plaintiffs, that any instructions submitted after March 6, 1991 were out of time, yet now wants to add unfiled instructions dated April 24, 1991." III Appellant's Reply App. 4092. We grant plaintiffs' motion to strike the "proposed" jury instructions and deny defendants' motion to supplement the record.

trial court with an opportunity to make proper changes to the jury instructions"); *see also Elmore v. United States*, 843 F.2d 1128, 1133 (8th Cir. 1988) (timely and proper objection that apprised the district court of an alleged omission in instructions preserved error on appeal despite failure to propose instruction).

We reject OXY's contention that the district court erred in declining to instruct the jury on a refusal to deal. "Plaintiffs did not argue that OXY's refusal to deal with Plaintiffs caused them damages. Rather, Plaintiffs [asserted] that it was OXY's 'requirement to deal' in order to use WNG's System which harmed Plaintiffs." Answer Brief of Plaintiffs-Appellees/Cross-Appellants to OXY USA, Inc.'s Brief-in-Chief and Brief-in-Chief of Plaintiffs-Appellees/Cross-Appellants on Cross-Appeal at 21. The district court did not err in refusing an instruction that did not address a claim (or defense) of a party.

OXY next asserts that the district court erred in failing to instruct the jury that truthful communication is privileged. Because the "proposed" instruction is not part of the record, nor preserved for appeal, we consider only OXY's related claim that the instruction given was improper. The district court instructed the jury that if OXY's interference was made with "honest intent," that interference was justified, and that if OXY had a legitimate economic interest in the subject matter of the contract or if it was seeking to protect its own contract rights, such conduct also was privileged and the verdict should be for OXY. OXY argues that the jury could have been misled into basing liability solely on OXY's alleged motive regardless of the truth of the statements. We conclude that use of the "honest intent" language was sufficient to prevent the jury from finding tortious interference if it also found that the communication was truthful. The instruction comports with Oklahoma law, which recognizes that allegedly improper interference may be justified, privileged or excused. Speculation that OXY's allegedly improper motive may have driven the jury to find liability without regard to the truthfulness of OXY's statements is not a sufficient basis to conclude the jury instructions were improper.

OXY finally asserts the district court should have instructed the jury that performance of a contract is relevant to its interpretation and validity. Because OXY did not preserve this issue for appeal, we review for plain error. *See United States v.*

Zimmerman, 943 F.2d 1204, 1213 (10th Cir. 1991). The district court instructed the jury that OXY contended that all of its contracts with plaintiffs were valid and binding. The district court also instructed the jury that OXY maintained that the terms of the contract were reflected by the conduct and written agreements of the parties. These instructions are correct statements of the applicable law and not clearly erroneous.

In sum, the jury instructions on tortious interference addressed each element of the claim and framed the issues for the jury. The district court permitted OXY to submit its theory of the case in a contention instruction. The court did not err in the selection of jury instructions because as a whole, they "properly guided the jury in its deliberations." *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463, 468 (10th Cir.), *cert. denied*, 498 U.S. 898 (1990).

III
Punitive Damages Award—Jury Instruction Errors

OXY argues that we must reverse and order a new trial because the jury instructions permitted the jury to award punitive damages for breach of contract and contract damages contrary to Oklahoma law. The district court denied OXY's requested jury instructions that (1) under Oklahoma law punitive damages must be based on the act that constitutes the cause of action, *see Garland Coal and Mining Co. v. Few*, 267 F.2d 785, 790 (10th Cir. 1959), and (2) Oklahoma law prohibits punitive damages for breach of contract. *See Burton v. Juzwik*, 524 P.2d 16, 19-20 (Okla. 1974). The court gave the following instruction: "If you find in favor of plaintiffs on their *tortious interference* with an existing contract claim, their tortious interference with expected contractual business relations claim, or both, then you may award plaintiffs punitive damages." II Appellant's App. 528.

OXY first argues that the instructions permitted the jury to award punitive damages for breach of contract, relying on *Silkwood v. Kerr-McGee Corp.*, 769 F.2d 1451 (10th Cir. 1985), *cert. denied*, 476 U.S. 1104 (1986), in which the jury awarded compensatory damages based on both personal injury and property damage and awarded $10 million in punitive damages. In *Silkwood*, we reversed the compensatory award for the

personal injury but upheld the award for property damage. Then, although an award for property damage would have supported a punitive award, we vacated the award and ordered a new trial on punitive damages because we could not determine to what extent the punitive award was based on the property damages that were upheld. *Id.* at 1461.

Silkwood is distinguishable from the instant case. In proving their tortious interference claim plaintiffs here necessarily had to show that their contracts with OXY were not valid at the time of OXY's tortious conduct; thus plaintiffs presented evidence that OXY had breached those contracts. But even though part of the proof may have been breach of contract, the cause of action here was tortious interference, and the jury was specifically instructed on the tortious interference claim.[11] The district court correctly instructed the jury on punitive damages.

In a related argument, OXY asserts that the jury instructions erroneously allowed a punitive damage award based in part on contract damages. Our review of the record, however, indicates that any evidence of contract damages was incidental to proving breach of contract.

IV
Punitive Damages—Procedural and Substantive Due Process

OXY makes a multiprong attack on the punitive damage award. It strenuously argues that the award violated both

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[11]OXY points out that in reviewing the punitive damages award the district court relied on OXY's alleged failure "to perform material obligations set forth in the contracts, including failure to pay for the gas taken, and improperly charg[ing] a gathering fee . . . and fraudulently induc[ing] plaintiffs into entering certain contracts." II Appellant's App. 794. OXY alleges that the district court failed to recognize that breaches of contract, misconduct and fraud cannot be the basis for punitive damages in Oklahoma. But, the district court concluded that the contract breaches, fraudulent inducement and misconduct were all evidence of OXY's *motive* in the tortious interference claims. *Id.* at 793- 94.

procedural and substantive due process. We first address OXY's procedural due process argument.

A
Procedural Due Process

In *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994), the Supreme Court noted that its recent opinions "strongly emphasized" the importance of the procedural component of the Due Process Clause. *Id.* at 2335 (citing *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993)) (the award had been reviewed and upheld by the district court and unanimously affirmed on appeal which created a strong presumption of validity); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 17, 20-21 (1991) (common law method of assessing punitive damages did not violate procedural due process; stressing the availability of both "meaningful and adequate review by the trial court" and subsequent appellate review)). These opinions set out the test for determining whether OXY received procedural due process on the punitive damages award.

In *Haslip* the Supreme Court considered whether the common law method for assessing punitive damages in Alabama afforded procedural due process. The three-tier common law approach to punitive damages, also employed in Oklahoma, first provides that the jury is instructed on the proper purpose for punitive damages and is told to consider the seriousness of the wrong and the amount needed to deter wrongful conduct. Second, the district court then reviews the jury award for excessiveness. Finally, the appellate court reviews the award. The Supreme Court held that this three-step process comports with due process. *Haslip*, 499 U.S. at 15.

OXY argues that the procedure in this case did not provide adequate limits on the jury's discretion to award punitive damages as required by *Haslip and Honda*. *See Silkwood*, 769 F.2d at 1461 (10th Cir. 1984) (Oklahoma courts provide little guidance to juries in imposing punitives). The jury instructions approved in *Haslip* provided the jury "significant discretion," but also "enlightened the jury as to the punitive damages' nature and purpose, identified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory." *Haslip*, 499 U.S. at 19. In the

instant case the jury was instructed that the purpose of punitive damages was to punish for misconduct and to serve as an example to others to deter them from similar conduct. The jury was advised that any award of punitive damages must be based on "sound reason and calm discretion" and not on the basis of "sympathy, bias or prejudice."[12] II Appellant's App. 529. The jury instructions stated that punitive damages must bear some relationship to both "the injury caused by the offensive conduct" and the conduct itself (but not necessarily to the amount of actual damages awarded). *Id.* These instructions were similar to those approved in *Haslip*. *See* 499 U.S. at 6. Although OXY argues that more guidance should have been given, the failure to do so was not unconstitutional. *See Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1097 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1778 (1992).

OXY also contends that the instruction was improper because the jury was allowed to consider the wealth of the defendant. But the plurality in *TXO* noted that "in *Haslip* we referred to the 'financial position' of the defendant as one factor that could be taken into account in assessing punitive damages." *TXO*, 113 S. Ct. at 2723 (plurality); *see also Robertson Oil Co., Inc. v. Phillips Petroleum Co.*, 14 F.3d 373, 380 (8th Cir. 1993) (allowing a jury to consider defendants' financial worth in deciding whether to award punitive damages is constitutionally permissible), *cert. denied*, 114 S. Ct. 2120 (1994). Further, OXY's argument that net worth was the *only* factor the jury was allowed to consider is disingenuous; as we have discussed, the jury was told to weigh various factors.

OXY also asserts that the jury should have been instructed to consider the objective standards in the Oklahoma statute in considering whether to award and the amount of punitive damages. The district court (on post-trial motions) and appellate courts and not the jury review the award against those standards. *See Haslip*, 499 U.S. at 20-22. The jury was instructed by what

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[12]Also, in its general instructions on damages the district court stated that the award must be just and reasonable and based on the evidence. II Appellant's App. 521.

was an essential paraphrase of Okla. Stat. tit. 23, § 9—the same statutory standard the district court used to "lift the lid" that otherwise would have limited punitives to the amount of the compensatory damages. *See* II Appellant's App. 528-30.

The second phase of the common law method for assessing punitive damages is adequate review by the district court. OXY argues that the district court's review here was inadequate in that it should have compared the award in this case with awards in similar cases. The Supreme Court has rejected the notion that a district court must articulate the reasons for upholding a punitive damages award; thus we will not require a district court to set out a comparative analysis when reviewing punitive damages. *See TXO,* 113 S. Ct. at 2724. OXY incorrectly asserts that the district court made no effort to articulate a basis for the award other than wealth. In fact, the district court made an in-depth analysis of the four factors considered in determining the reasonableness of an award of punitive damages under Oklahoma law: (1) cause and extent of plaintiff's injury, (2) harm to society, (3) culpability as evidenced by defendant's profit incentive, and (4) defendant's wealth.[13] II Appellant's App. 791-814.

The district court first considered the reasonableness of the award in light of the cause and extent of plaintiffs' injury. *See Chandler v. Denton,* 741 P.2d 855 (Okla. 1987); *Hobbs v. Watkins,* 481 P.2d 746, 754 (Okla. 1971). Essentially OXY argues that the harm to the plaintiffs here was not great and that the district court's statements that plaintiffs were deliberately shut-in and their business was almost decimated, were not supported by the evidence. The district court's analysis, however, is supported by the evidence. For example, the record reflects that OXY closed the valves on twelve wells. The district court also relied on OXY's untruthfulness to third parties with whom plaintiffs were attempting to conduct business, and the

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[13]OXY in its substantive due process argument attacks the district court's findings on each of these Oklahoma standards. We believe they are more meaningfully reviewed here in the procedural due process portion of the opinion.

jury's findings "that OXY's conduct was oppressive, wanton or associated with ill will or spite towards plaintiffs." II Appellant's App. 791.

Second, the district court considered whether the award was justified by the harm caused to society. The district court determined that OXY intended to injure plaintiffs and wrongfully destroy honest competition. The district court concluded that OXY's behavior had a potentially very negative impact on the public, the ultimate consumer of energy resources. OXY takes issue with the district court's statement that "OXY's conduct incrementally damages the United States in its present struggle to remain a global economic power." *Id.* at 797. The district court did not assert that OXY's conduct was largely responsible for our society's economic problems, however, rather it indicated that OXY should be an example to deter others from suppressing free enterprise.[14]

Third, the district court considered OXY's profit incentive, apparently as a subset of defendant's culpability. *See Silkwood,* 769 F.2d at 1466 (Doyle, J., dissenting). OXY attacks the district court's statements that "OXY itself introduced evidence that suggested that its profit incentive was in excess of $4.25 million." II Appellant's App. 797. OXY also challenges the $10 million potential profit figure that the plaintiffs offered and the district court appeared to adopt. *See id.* We agree with OXY that some of these figures appear to be incorrect or misapplied.[15]

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[14]OXY argues that the district court relied on a misstatement by plaintiffs' counsel that "6000 contracts were affected, involving 100,000 producers," *see* II Appellant's App. 798, but the record contains evidence of 6,000 contracts. *See* VIII Appellant's App. 2705.

[15]OXY correctly points out that the actual figure for its profit incentive is half of the $4.25 million because OXY only owned half of the plant. OXY also attacks the district court's statement that "plaintiffs contend that OXY stood to ultimately profit by approximately $10 million from its unlawful conduct" and therefore the punitive award was only three times OXY's profit. The district court also noted that OXY could only directly profit by a factor of 50 percent

The district court's analysis of this factor, however, is broader, and acknowledges the *potential* widespread injury to large numbers of independent producers if OXY continued interfering with contracts. Thus, the district court appeared focused on punitive damages as a deterrent to ill-gained profits.

OXY contends that the district court improperly assigned culpability to an OXY official's statement that "if we let this happen with one producer, we could expect for everybody to want to jump right in the middle of us and do the same thing. So we were trying to protect our plant." *Id.* at 799. OXY insists that this was merely a business person trying to protect the corporation's contract rights. But the district court was left with the "indelible impression" that OXY was worried about producers getting restless and decided to "get out there and subdue them" so that OXY did not lose control. *Id.* While OXY disputes the characterization of this statement, apparently the jury also agreed. We cannot say from the cold record that this interpretation was inaccurate.

Finally, the district court analyzed OXY's wealth. Although OXY acknowledges that the financial condition of a defendant is relevant, *see Rodebush v. Oklahoma Nursing Homes, Ltd.*, 867 P.2d 1241, 1251 (Okla. 1993); *Mitchell v. Ford Motor Credit Co.*, 688 P.2d 42, 46 (Okla. 1984); *see also Spaeth v. Union Oil Co.*, 710 F.2d 1455, 1460 (10th Cir. 1983), *appeal after remand*, 762 F.2d 865 (10th Cir. 1985), *cert. denied*, 476 U.S. 1104 (1986), it argues that the jury instruction unfairly singled out wealth and followed an inflammatory closing argument. As we have already discussed, *TXO* indicates that telling the jury that they may consider a corporation's or individual's wealth is not a violation of procedural due process. Further, the jury was

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of that $10 million total because of co-owner WNG's interest. Therefore the punitive damage award was actually six times OXY's potential profit.

also told to consider the type of conduct and the necessary deterrent effect.[16]

In addition to looking at these four factors, the district court also reviewed the award for excessiveness. It correctly noted that Oklahoma law does not require the amount of punitive damages to be a particular ratio to the amount of actual damages, *Buzzard v. Farmers Ins. Co.*, 824 P.2d 1105, 1115 (Okla. 1991), but instead focuses on the harm defendant's conduct caused or might potentially cause. *Id.; see also Silkwood*, 769 F.2d at 1460 (although proportionality is not required, there must be some relationship to the injuries actually suffered and to society as a whole). The district court considered the ratio of actual to punitive damages, and also that the award was less than one percent of OXY's net worth.

The district court determined that the punitive damages were appropriate to serve their purposes (citing *Thiry v. Armstrong World Indus.*, 661 P.2d 515, 518 (Okla. 1983)). Our review of the record and the district court's order indicates that procedural due process was afforded both in the jury instructions and in the district court's review of the award.[17] *See also Morgan v.*

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[16]We also note that OXY did not raise a contemporaneous objection to the instruction as to specificity and did not submit a more detailed instruction that it now insists was required. Therefore this objection is waived. *See Rogers v. Northen Rio Arriba Elec. Coop., Inc.*, 580 F.2d 1039, 1042 (10th Cir. 1978); *see also* Fed. R. Civ. P. 51.

[17]OXY also asserts that jury discretion was not adequately limited because in lifting the Oklahoma cap on punitive damages the district court considered conduct other than OXY's alleged tortious interference with contract and potential contract. Thus OXY argues that this statutory safeguard was not available to them. The Oklahoma statute allows the jury to award punitives above the amount of actual damages only if the district court finds on the record that there is clear and convincing evidence "of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed." Okla. Stat. tit. 23, § 9; *see also Rodebush v. Okla. Nursing Homes, Ltd.*, 867 P.2d 1241, 1246-48 (Okla. 1993). Section 9 provides defendants with procedural protection beyond that required by

Woessner, 997 F.2d 1244, 1257 (9th Cir. 1993), *cert. dismissed*, 114 S. Ct. 671 (1994). The final procedural due process safeguard is our substantive review of the amount of the punitive damages award.

B
Substantive Due Process/Excessiveness

We review a punitive damage award to insure that "it does not exceed an amount that will accomplish society's goals of punishment and deterrence." *Haslip*, 499 U.S. at 21 (quoting *Green Oil Co. v. Hornsby*, 539 So.2d 218, 222 (Ala. 1989)). We focus on whether the punitive damages are reasonable as to their amount and rational in view of their purpose to punish and deter defendant's conduct. *Id.*

The evaluation of whether a jury's award of punitive damages was excessive is a matter of federal law, even though the justification for punitive damages is a matter of state law. *Capstick v. Allstate Ins. Co.*, 998 F.2d 810, 819 (10th Cir. 1993). In this circuit we have asked whether the award was "so excessive as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial." *Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152, 1168 (10th Cir. 1981) (in banc), *cert. denied*, 464 U.S. 824 (1983). The Supreme Court in *Haslip* suggested that a "manifestly and grossly excessive" standard does not satisfy due process. *Haslip*, 499 U.S. at 21 n.10. Thus, the Fourth Circuit in *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 105 (4th Cir. 1991), *modified by Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1414 (4th Cir. 1992), determined that South Carolina's "excessiveness" standard for reviewing punitive damages did not comport with due process. We believe, however, that our

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common law. We have reviewed the entire record and while the district court may have supported his lifting of the damages cap with some conduct other than tortious interference, the record supports the action of the judge in lifting the cap based on OXY's conduct.

standard satisfies constitutional standards because in determining whether the award meets the excessiveness standard, we also consider the state's substantive factors. *See Capstick*, 998 F.2d at 819 n.13 (citing *Malandris*, 703 F.2d at 1172-73).

OXY argues that the $30 million punitive damages award can be explained only by passion or prejudice. *See Kelley v. Sears, Roebuck & Co.*, 882 F.2d 453, 459-60 (10th Cir. 1989); *Dearmore v. Gold*, 400 F.2d 887, 888 (10th Cir. 1968). OXY asserts that plaintiffs' closing argument was inflammatory on the issue of OXY's wealth. Plaintiffs' attorney stated that OXY earned over $36 million a week and urged the jury to "[t]ake away OXY's allowance for a week, that's 36 million dollars." VIII Appellant's App. 2767. Although OXY may be correct that the jury considered the $36 million figure in reaching the $30 million punitive award, we cannot conclude on the record as a whole that the jury acted out of passion or prejudice.

OXY also argues that compared to cases in which innocent people died as a result of egregious corporate conduct, this case, involving purely economic loss, does not call for such a large punitive damage award, citing *Mason v. Texaco, Inc.*, 948 F.2d 1546 (10th Cir. 1991) (*Mason II*) ($25 million punitives remitted to $12.5 million), *cert. denied*, 112 S. Ct. 1941 (1992), and *O'Gilvie v. International Playtex, Inc.*, 821 F.2d 1438 (10th Cir. 1987) ($10 million punitives upheld in toxic shock death), *cert. denied*, 486 U.S. 1032 (1988). OXY does not cite any cases holding that punitive damages in economic injury cases must be less than those in personal injury cases, and we have found none. We note that recent highly publicized awards against major oil companies Exxon and Texaco involved punitive damages awards of billions of dollars for economic injury.

OXY also argues that the ratio of punitives to compensatory damages, here 111:1, is indicative of an excessive award. OXY relies on *Haslip* for the proposition that the four to one ratio there was "close to the line." 499 U.S. at 23. The Supreme Court recently, however, upheld a punitive damages award with a ratio of over 526:1. *TXO*, 113 S. Ct. at 2721. The Court "eschewed an approach that concentrates entirely on the relationship between actual and punitive damages." *Id.* The *TXO* opinion noted that even if plaintiff's figures were exaggerated, the jury could have believed that there was a multimillion dollar

reduction in defendant's royalty payments. Although plaintiffs here may have exaggerated the amount of potential profit to OXY, the record indicates that profit was in the million dollar range. After *TXO,* we cannot conclude that the disparity between actual and punitive damages is controlling. An 111:1 ratio is not necessarily an excessive award, particularly in light of defendant's net worth.

The jury apparently considered the wealth of the defendant, a large oil company with a parent company worth over a billion dollars, in determining the amount needed to punish and deter. *See Haslip,* 499 U.S. at 21 (punitive damage award must be reasonable in amount and "rational in light of [the] purpose to punish what has occurred and to deter its repetition"), OXY cites several cases in which the net worth in 1990 of the defendant companies was greater than OXY's, yet smaller punitive awards were found excessive. *See Mason II,* 948 F.2d 1546 ($9 billion net worth); *Kelley,* 882 F.2d 453 ($12.8 billion net worth - $1.25 million award found excessive); *Spaeth,* 710 F.2d 1455 ($2.5 billion net worth - $3 million award excessive). Of course, the ratio of a defendant's worth to the punitive damages awarded is not a benchmark of excessiveness. *See, Mason II* (a previous jury had declined to award any punitive damages); *Spaeth* (actual damages of $22,807); *Kelley* (new trial ordered on compensatory damages issue; court noted that Colorado law requires punitive damages to bear some relationship to actual damages, thereby also providing support for new trial on punitive damage issue). More fundamentally, however, we would exceed our scope of review if we required symmetry in the manner OXY suggests.

OXY further contends that the sheer size of the award alone shocks the judicial conscience, and therefore we should order a remittitur. OXY notes that this is the largest punitive damages award in Oklahoma history and is twice the amount of any award upheld in this circuit, citing *Mason II.* The size of an award alone is not enough to establish passion and prejudice. In *Mason II,* a man died of leukemia after using a benzene test kit that contained no warning. The jury awarded his estate and spouse $9,025,000 in actual damages. We determined that the punitive damages award for $25 million was a "staggering sum" that "shock[ed] our judicial conscience" and was "excessive and beyond a reasonable punitive award under the law of Kansas." *Mason II,* 948 F.2d at 1560-61. On its face, *Mason II* appears

to support OXY's argument. This court noted that in *Mason II* "it was significant to the panel that in the first trial . . . the plaintiff sought punitive damages of only $8 million and the first jury did not award any punitive damages." *Capstick*, 998 F.2d at 820. In *Mason II*, the panel believed the punitive damage award was aberrational.

To be sure $30,000,000 is a strikingly large figure when viewed from the perspective of three judges whose combined incomes in their lifetimes will not come close to that figure. Viewed from the perspective of a successful individual plaintiff (and his lawyer if on a contingent fee) the reward is like winning a lottery because it immediately catapults the plaintiff (and perhaps his lawyer) to a position of great wealth. But examined from the perspective of what is necessary to punish a very wealthy corporation, and to deter it and other similarly situated from like behavior—which we are required to do—30,000,000 is not necessarily a shocking figure.

Our own review of the voluminous record reveals several factors that support the extremely large punitive damages award. The district court summarized those factors when it found clear and convincing evidence to lift the cap on punitives: (1) OXY withheld payments it owed to plaintiffs to induce plaintiffs to change their position; (2) OXY changed its position on the status of contracts based on a reassessment of their strategic position; (3) OXY employees altered internal documents containing damaging statements; and (4) OXY selectively incorporated charges agreed to in contracts to benefit OXY at plaintiffs' expense. VIII Appellant's App. 2738-39. Further, after the hearing on the motion for new trial or remittitur, the district court noted "that there had been a complete change in the position of [OXY] with respect to the coterminous provisions and whether those contracts retained validity." *Id.* at 2762. The district court also observed that he jury was "visibly reactive to" the testimony of OXY's corporate representative that "'we cannot let [plaintiffs] get away with this or everybody else will try to do it [bypass Rodman]. It was a 'the natives are restless, we better get out there and subdue them' kind [of] presentation." *Id.*

The jury heard voluminous evidence that OXY engaged in oppressive and coercive behavior that interfered with plaintiffs'

present and prospective contracts; the consequences of such unchecked behavior could be disastrous. The district court properly allowed the jury to consider the potential harm that might result if defendant's conduct continued unabated. *TXO*, 113 S. Ct. at 2722. The jury evidently was persuaded that only a very sizeable award would truly punish OXY and deter future tortious conduct. We will not disturb the jury's award.

V
Breach of Contract Counterclaim

OXY asserts that the district court improperly failed to instruct the jury that performance is relevant in the interpretation and validity of contracts. OXY correctly points out that the validity of the contracts between the parties was a central element of its claims. But the jury was charged to consider the conduct of the parties in determining whether or not the contracts were valid; we discern no error and deny OXY a new trial on this claim of error.

VI
Antitrust Claims

Plaintiffs appeal the district court's grant of summary judgment for OXY and WNG on plaintiffs' antitrust claims, which asserted

> that through concerted efforts OXY and [WNG] have jointly controlled the flow of gas and transportation of gas on the Rodman Gathering System by requiring any person who wants to transport gas on the System to enter into arrangements with OXY for the compression, treating and processing of that gas. OXY provides the only field compression on the System and will not provide compression unless Plaintiffs agree to have their gas processed at the Rodman Plant. When OXY demanded that Plaintiffs continue to have their gas treated and processed at the Rodman Plant as a condition to collecting and transporting over the Rodman Gathering System, Plaintiffs rejected this demand. Thus, Defendants have refused to provide transportation service for Plaintiffs' gas to their customers unless Plaintiffs

> agree to have their gas processed by OXY. Plaintiffs allege, in part, illegal tying, conspiracy to restrain trade and conspiracy to monopolize.

I Appellant's App. 257-58 (quoting Order Denying Defendants' Motions for Protective Orders, No. CIV-90-1006-A, at 3-4 (W.D. Okla. Mar. 21, 1991)). Plaintiffs appeal summary judgment only of the Sherman Act § 1 tying claim and the conspiracy to restrain trade claims.

We review the entry of summary judgment applying the same legal standard used by the district court under Fed. R. Civ. P. 56(c). *Russillo v. Scarborough,* 935 F.2d 1167, 1170 (10th Cir. 1991). "Summary judgment is appropriate when there is no genuine dispute over a material fact and the moving party is entitled to judgment as a matter of law." *Id.* We review de novo the district court's conclusions of law, and read the record in the light most favorable to the parties opposing the motion for summary judgment. *See City of Chanute v. Williams Natural Gas Co.*, 955 F.2d 641, 647 (10th Cir.), *cert. denied,* 113 S. Ct. 96 (1992). We acknowledge that summary judgment in antitrust cases is generally disfavored, *id.;* however, "allegations of restraint of trade must be supported by significant probative evidence in order to overcome a motion for summary judgment." *Key Fin. Planning Corp. v. ITT Life Ins. Corp.*, 828 F.2d 635, 638 (10th Cir. 1987) (quoting *Instructional Sys. Dev. Corp. v. Aetna Casualty & Sur. Co.*, 817 F.2d 639, 644 (10th Cir. 1987) (citations omitted).

A
Tying

In their § 1 tying claim, plaintiffs alleged that in order to purchase transportation on the Rodman system they were forced to purchase gas processing through OXY's Rodman plant. Plaintiffs specifically asserted that WNG in cooperation with OXY used a nomination procedure to thwart competition. WNG's nomination procedure required a shipper to submit a nomination informing WNG of the amount of gas to be shipped and the location of the receipt and the delivery points. WNG requested confirmation of the nomination from the gas producer and the recipient of the gas. WNG also sought OXY's confirmation of all nominations even though the tariff contained

no such precondition. Plaintiffs alleged that OXY, with WNG's express consent, systematically refused to confirm gas that was not destined for processing at the Rodman plant.

In response, WNG and OXY asserted that although WNG was an open access transporter, the existing system did not allow movement of gas from the Rodman gathering system to WNG's transmission line without going through OXY's Rodman plant. WNG produced evidence that it provided plaintiffs with other options to move gas from the Rodman area to WNG's main transmission line, including arranging with a third party to perform necessary compression and treating of gas, or by installing a gathering compression and treating facility, or by arranging with a third party to use their facility. WNG also informed plaintiffs that there were existing gathering lines and processing plants owned by other companies in the Rodman area that connected either directly or indirectly to WNG's transmission system through which plaintiffs could move their gas to WNG's system and avoid OXY's facilities.

The district court found that "[p]laintiffs cannot prove anticompetitive tying," and also stated "the tying claim fails for the same reason of lack of monopoly power, based on insignificant market strength, that immobilized the monopolization and abuse of monopoly power claims." I Appellant's App. 268-69 (district court order) citing *Smith Mach. Co. v. Hesston Corp.*, 878 F.2d 1290, 1294-98 (10th Cir. 1989), *cert. denied*, 493 U.S. 1073 (1990)).

"A tying arrangement is 'an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product . . . . Such an arrangement violates § 1 of the Sherman Act if the seller has "appreciable economic power" in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market.'" *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 112 S. Ct. 2072, 2079 (1992) (citing *Fortner Enters, Inc. v. United States Steel Corp.*, 394 U.S. 495, 503 (1969) (internal citation omitted)). Thus there are three elements necessary to a tying claim.

> First, purchases of the tying product must be conditioned upon purchases of a distinct tied

> product. Second, a seller must possess sufficient power in the tying market to compel acceptance of the tied product . . . . Finally, a tying arrangement must foreclose to competitors of the tied product a "not insubstantial" volume of commerce.

Fox Motors. Inc. v. Mazda Distribs. (Gulf), Inc., 806 F.2d 953, 957 (10th Cir. 1986) (citations omitted). Plaintiffs assert that they demonstrated material issues of fact existed on each of the three tying elements and summary judgment was improper. Because we believe plaintiffs failed to meet their burden on at least one of the three elements, we uphold the grant of summary judgment.

The district court found, *inter alia,* that the tying claim failed on the element of market or economic strength.[18] I Appellant's App. 269. The district court "reject[ed] outright plaintiffs' self-serving assertion that defendants control virtually one hundred percent (100%) of the relevant market, which plaintiffs define as the area consisting of only the low-volume wells requiring long-term contracts, and which is controlled exclusively by the Rodman Gathering System." *Id.* at 261.[19] The district court determined that no reasonable jury could accept that definition; the smallest relevant market would be the four-county area where the gas wells at issue are located. The district court also found that a market based on sources of natural gas that are in close proximity to a pipeline is an

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[18]In analyzing the monopolization and abuse of monopoly power claim (not appealed here), the district court determined that plaintiffs failed to show significant market strength. The district court used this analysis in its findings on the market strength element of the tying claim.

[19]Although plaintiffs originally described the relevant market as the four-county area, they later attempted to redefine the relevant market to include only a few wells described as low deliverability, low reserve wells that were already connected to the Rodman system with low production so that none of defendants' many competitors were willing to invest the funds necessary to extend a line to them. The district court stated that "plaintiffs are saddled with their Complaint as filed in this Court." I Appellant's App. 269.

insufficient market definition as a matter of law. I Appellant's App. at 263 (citing *Carlock v. Pillsbury Co.*, 719 F. Supp. 791, 843 (D. Minn. 1989) ("courts have refused to define the relevant market as one encompassing only the defendant's product")); *accord Consul, Ltd. v. Transco Energy Co.*, 805 F.2d 490, 495 (4th Cir. 1986) ("A market drawn too tightly . . . creates the illusion of market power where none may exist."), *cert. denied*, 481 U.S. 1050 (1987).

The district court noted that the Rodman gathering system and the Rodman plant controlled less than ten percent of the Sooner Trend market. The court acknowledged that control of a small percentage of the relevant market is not considered per se insignificant market strength in this circuit. *Compare Reazin v. Blue Cross and Blue Shield*, 899 F.2d 951, 968 (10th Cir.) ("market share percentages may give rise to presumptions, but will rarely conclusively establish or eliminate market or monopoly power"), *cert. denied*, 497 U.S. 1005 (1990) *and Shoppin' Bag v. Dillon Cos.*, 783 F.2d 159, 162 (10th Cir. 1986) (other factors include number and strength of competitors, difficulty in entering the market, consumer sensitivity to price changes, market developments, and multimarketing by defendant) *with Colorado Interstate Gas Co. v. Natural Gas Pipeline of Am.*, 885 F.2d 683, 694 n.18 (10th Cir. 1989) ("Supreme Court has refused to specify a minimum market share necessary to indicate a defendant has monopoly power, [but] lower courts generally require a minimum market share of between 70% and 80%") (dictum), *cert. denied*, 498 U.S. 972 (1990). The district court then determined that plaintiffs failed to rebut the presumption that OXY and WNG's relatively insignificant market share did not constitute monopoly power. The court relied on evidence of other relevant factors; for example, that the four-county area was served by sixteen pipelines and gathering systems and thirteen gas processing plants,[20] and that plaintiffs themselves sold or transported gas in that four-county area through many companies, including Phillips Petroleum, Conoco, Exxon, and Texon. The district

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[20]Two miles was the distance that plaintiffs' expert identified as appropriate to measure competition.

court correctly determined that plaintiffs failed to establish defendants had sufficient strength in the relevant market; hence we affirm entry of summary judgment on the tying claim.

B
Conspiracy to Restrain Trade

Plaintiffs also assert that the district court erred in granting summary judgment on the § 1 claim of conspiracy to restrain trade. To recover on the conspiracy claim plaintiffs must establish a contract, conspiracy, or combination to unreasonably restrain trade. *See Tarabishi v. McAlester Regional Hosp.*, 951 F.2d 1558, 1571 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 2996 (1992). Plaintiffs' conspiracy claim essentially duplicates their tying claim, because here the alleged tying required both an agreement between the defendants as well as the fundamental "tied" agreement with the purchaser (plaintiffs). The district court found that plaintiffs did not present direct evidence of a conspiracy. In the absence of such direct evidence, we will not presume that conduct which is arguably consistent with legitimate business activity as well as an illegal conspiracy supports an inference of anticompetitive activity. Instead, the issue becomes whether plaintiffs presented evidence "'that tends to exclude the possibility' that the alleged conspirators acted independently." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)). Thus when evidence of conspiracy is ambiguous, we next ask if there is "any evidence that tends to exclude the possibility that the defendants were pursuing [permissible] independent interests." *Gibson v. Greater Park City Co.*, 818 F.2d 722, 724 (10th Cir. 1987). The district court found the inference of conspiracy was unreasonable because if WNG denied plaintiffs' transportation on the Rodman system it would have reduced WNG's profits. We agree and affirm the summary judgment on the conspiracy claim.

VII
Denial of CTR's Motion for Attorney's Fees on OXY's Counterclaim

Plaintiffs next assert that the district court erred in denying their motion for attorney's fees on OXY's counterclaim.

Oklahoma law provides that in a contract case "the prevailing party *shall* be allowed a reasonable attorney fee to be set by the court." Okla. Stat. tit. 12, § 936 (emphasis added). Plaintiffs requested attorney's fees, and they included two affidavits with their motion setting forth the hours, rates and total amounts billed by each attorney. Plaintiffs did not include billing statements in their motion and brief, although they did provide those to OXY; plaintiffs assert, however, that the fee request was apportioned among the various claims in the case and that they only requested fees for defense of the counterclaim. Without holding an evidentiary hearing, the district court denied the fee request in its entirety.

We review the district court's decision on attorney's fees for abuse of discretion. *See Cobb v. Saturn Land Co.*, 966 F.2d 1334, 1338 (10th Cir. 1992); *Southwestern Bell Telephone Co. v. Parker Pest Control. Inc.*, 737 P.2d 1186, 1189 (Okla. 1987). The district court denied plaintiffs' fee request because it found that (1) plaintiffs failed to meet their burden of proving that the request was reasonable; (2) the request was "unreasonable," "duplicative," and "excessive," and (3) plaintiffs' counsel engaged in conduct suggesting, "bad faith and gross- neglect of professional duty." IV Appellees' App. 1312. The district court relied on cases endorsing the reduction of fees because of insufficient documentation. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *Mares v. Credit Bureau of Raton*, 801 F.2d 1197, 1203 (10th Cir. 1986). We agree with plaintiffs that *Hensley* and *Mares* provide authority only for reducing fees and not for a complete denial of fees.

Plaintiffs point to our case of *Hess Oil Virgin Islands Corp. v. UOP, Inc.*, 861 F.2d 1197 (10th Cir. 1988), in which the district court held no evidentiary hearing but found that a one-page affidavit was not substantial enough to support a claim for fees. We stated "the plaintiff is entitled to an opportunity to present evidence to support the claim." *Id.* at 1211 (applying Virgin Island law, where attorney's fee award is discretionary, to attorney's fee issue). An evidentiary hearing on the fee application is at least as important here where a reasonable fee award is mandated by statute.

We understand the district court's hesitancy to award attorney's fees if there was a strong likelihood that plaintiffs'

counsel included billing generated exclusively by the antitrust claims. But an evidentiary hearing provides a forum for the district court and defendants to resolve these concerns. It also seems an act of greed for plaintiffs to ask for attorney's fees on the counterclaim in view of the recovery they made on their tort claim. But the Oklahoma law speaks in mandatory language. Therefore, we hold that it was an abuse of discretion to deny all attorney's fees without holding an evidentiary hearing allowing plaintiffs to explain their claims. We remand for a determination by the district court of reasonable attorney's fees as required by the Oklahoma statute. It is axiomatic, of course, that "reasonable fees" include only those charges attributable to the contract claims.

Case No. 92-6350 is AFFIRMED. Case No. 92-6384 is AFFIRMED IN PART and REMANDED to the district court for determination of the attorney's fees issue.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

CONTINENTAL TREND RESOURCES, INC.; HAROLD G. HAMM, TRUSTEE OF THE HAROLD G. HAMM REVOCABLE INTER VIVOS TRUST; GARY H. WRIGHT; CINDY WRIGHT; JEFFERY B. HUME; and FARRAR OIL COMPANY,	)	
Plaintiffs,	)	No. CIV-90-1006-A
v.	)	
OXY USA, INC. and WILLIAMS NATURAL GAS COMPANY,	)	
Defendants.	)	

FILED
Oct. 20, 1992

ORDER DENYING MOTION TO ALTER OR AMEND JUDGMENT, FOR REMITTITUR, FOR JUDGMENT AS A MATTER OF LAW OR FOR A NEW TRIAL

I. INTRODUCTION

At issue are defendant Oxy USA Inc.'s ("Oxy") motion to alter or amend judgment, for remittitur, for judgment as a matter

of law ("JMOL") or for a new trial,* which is at issue upon briefs and after oral argument.

II. BACKGROUND

Plaintiffs are independent producers and marketeers of natural gas and liquid byproducts. Defendants process, market and transport natural gas. Defendant Williams Natural Gas Company ("WNG") owns and Oxy operates and maintains the Rodman Gathering System, which is a gas-gathering or collection and transmission pipeline system that distributes gas to intrastate and interstate markets. Defendant Oxy co-owns the Rodman Plant, which is at the outflow of the gathering system, with Oryx, a non-party to the present suit. Oxy solely operates and maintains the plant, which can perform compression and treatment of gas that may be necessary to meet the gathering system's transmission line quality specifications and pressure standards imposed by the Federal Energy and Regulation Commission ("FERC"). The transmission system is a regulated, non-discriminatory, open-access transporter of gas subject to FERC's gas tariffs.

This case was filed with both federal and pendent state claims.

On March 26, 1991, the Court denied plaintiffs' motion to bifurcate or abstain. *See Lis v. Robert Packer Hosp.*, 579 F.2d 819, 823-24 (3d Cir.), *cert. denied*, 439 U.S. 955 (1978); *Organic Chems., Inc. v. Carroll Prods.. Inc.*, 86 F.R.D. 468, 469 (W.D. Mich. 1980). On April 17, 1991, the Court granted partial summary judgment to defendants Oxy USA, Inc. and Williams Natural Gas Company on plaintiffs' antitrust claims.

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*Defendants originally moved in part for judgment notwithstanding the verdict ("JNOV"), but on December 1, 1991, the motion was recharacterized pursuant to statute as a JMOL. *See* 28 U.S.C. Fed. R. Civ. P. 50(b) (revised, effective Dec. 1, 1991). This Order shall interchangeably refer to both procedural devices, but they are essentially the same. Likewise, at trial, defendants moved for a directed verdict, which has now also been recharacterized as a motion for JMOL. *See id.* at 50(a). Technically, at the post-trial stage the motion is simply renewed. *Id.*

See Continental Trend Resources, Inc. v. Oxy USA. Inc., No. Civ-90-1006-A, 1991 U.S. Dist. LEXIS 15203; 1991-2 Trade Cas. (CCH) ¶ 69,510 (W.D. Okla. Apr. 17,.1991). A jury trial was held from April 8-29,1991 on plaintiffs' claims of tortious interference with contracts and tortious interference with prospective business advantage, and Oxy's breach of contract counterclaims. The Court directed a verdict for defendant Williams Natural Gas Company at the conclusion of plaintiffs' case-in-chief. *See* Trial Transcript at 1662 (Apr. 23, 1991).

Following trial, the jury returned a unanimous verdict for plaintiffs for $269,000 in actual damages, and $30 million in punitive damages. Ironically, on the eve of jury selection, plaintiffs represented to the Court that it lacked jurisdiction to entertain pendent state claims because the Court had granted summary judgment to defendant on the federal claims. With a further note of irony, Oxy argued that plaintiffs were afraid to face their day of reckoning. Plaintiffs' motion to dismiss was denied by the Court and sanctions were awarded to defendant Oxy for having its litigation-preparation time disrupted by a last-minute motion that was absolutely meritless. In substantial part, defendant Oxy received the benefit of the majority of the Court's rulings, including ones overruling plaintiffs' objections to jury instructions. Consequently, plaintiffs had to overcome a rather heavy burden and had to convince eight jurors, two more than the legal minimum, that their claims were meritorious.

III. STANDARDS OF REVIEW FOR MOTIONS FOR JMOL OR JNOV, REMITTITUR, AND NEW TRIAL

"Motions for a directed verdict and for judgment n.o.v. are considered under the same standard." *Hurd v. American Hoist & Derrick Co.*, 734 F.2d 495, 498 (10th Cir. 1984). The standard was summarized by the Tenth Circuit in *Rajala v. Allied Corp.*, 919 F.2d 610 (10th Cir. 1990), *cert. denied*, 111. S. Ct. 1685 (1991). The test is whether there is evidence upon which the jury could properly find a verdict for the party opposing the motion for directed verdict or motion for JNOL or JNOV. *Id.* at 615.

In making that determination the court "may not weigh the evidence, pass on the credibility of witnesses, or substitute its

judgment for that of the jury," but rather "must view the evidence most favorably to the . . . [nonmoving] party and give that party the benefit of all reasonable inferences from the evidence." *Brown v. McGraw-Edison Co.*, 736 F.2d 609, 613 (10th Cir. 1984); *accord, e.g., Sandlin v. Texaco Ref. & Mktg., Inc.*, 900 F.2d 1479, 1483 n.5 (10th Cir.), *cert. denied*, 111 S. Ct. 252 (1990). "Jurors are charged with the exclusive duty of assessing the credibility of witnesses and determining the weight to be given testimony, taking into consideration the appearance and general demeanor of each and every witness." *Rasmussen Drilling Inc. v. Kerr-McGee Nuclear Corp.*, 571 F.2d 1144, 1149 (10th Cir.), *cert. denied*, 439 U.S. 862 (1978).

The Court may not substitute its judgment for that of the jury even if the Court may have reached a different conclusion had the case been tried solely to the Court. *See, e.g., Fireman's Fund Ins. Co. v. Aalco Wrecking Co.*, 466 F.2d 179, 186 (8th Cir. 1972) (merely because the jury could have drawn different inferences or conclusions or because the court believes that another result is more reasonable is no basis for granting a new trial) (citing *Tennant v. Peoria & Pekin Union Ry.*, 321 U.S. 29, 35 (1944)), *cert. denied*, 410 U.S. 930 (1973). "The jury—or the court if the case is tried without a jury—has the *exclusive* function of appraising credibility, determining the weight to be given to the testimony, drawing inferences from facts established, resolving conflicts in the evidence, and reaching ultimate conclusions of facts." *Rasmussen Drilling Inc. v. Kerr-McGee Nuclear Corp.*, 571 F.2d at 1149 (emphasis in original).

The motion for JMOL may not enlarge or assert new matters not presented in the JMOL urged at trial or the motion for directed verdict. *Id.* at 265; 9 C. Wright & A. Miller, *Federal Practice & Procedure: Civil 2d* at § 2537, p. 598 (1971) ("Since [the motion for JNOV] is technically only a renewal of the motion for directed verdict made at the close of the evidence, it cannot assert a ground that was not included in the motion for directed verdict.") (footnote omitted). One of the purposes of this rule is to allow the prevailing party the opportunity to correct deficiencies prior to the submission of the case to the jury. *Anderson v. United Telephone Co.*, 933 F.2d at 1503; *see generally Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 826

F.2d 712, 716 (7th Cir. 1987) ("A party that fails to state its objection to jury instructions specifically cannot challenge the jury's verdict on that issue."); *Marshall v. El Paso Natural Gas Co.*, 874 F.2d 1372, 1385 (10th Cir. 1989) (a specific motion for JMOL at trial or directed verdict is sufficient to preserve the issue of the sufficiency of the evidence to support a punitive damages award).

When considering the excessiveness of the amount of a damages award, the Court must determine whether it resulted from jury passion, bias or prejudice so as to taint the finding of liability. If such is found then a new trial is required; otherwise, any excessiveness may be cured through a remittitur within the sound discretion of the Court if the reduced amount is acceptable to plaintiff. *See Mason v. Texaco, Inc.*, 948 F.2d 1546, 1560-61 (10th Cir. 1991), *petition for cert. filed*, 1991 U.S. App. LEXIS 27,011 (U.S. Mar. 9, 1992); 11 C. Wright & A. Miller, *Federal Practice & Procedure: Civil 2d* at § 2815 (1973) ("A remittitur gives the plaintiff a choice. He [or she] can refuse to accept the reduced amount of damages and instead proceed to a new trial."). The district court's ruling on a motion for directed verdict or for JMOL or JNOV is reviewed *de novo* by the Tenth Circuit, applying the same standard as that used by the district court. *Rajala v Allied Corp.*, 919 F.2d at 615; *Sandlin v. Texaco Ref. & Mktg., Inc.*, 900 F.2d at 1483 n.5; *Brown v. McGraw-Edison Co.*, 736 F.2d at 613.

IV. ANALYSIS

A. Denial of Motion for JMOL

Applying the JMOL standard to the facts in the record and carefully considering the briefs of the parties, the Court finds that the jury's verdict on plaintiffs' claims is rationally based, not driven by bias, prejudice or passion, or improper motive, and should stand. The Court previously assessed the sufficiency of the evidence at the directed verdict stage following plaintiffs' case-in-chief and found the evidence to be totally adequate as to Oxy with regard to the claims presented to the jury. The Court partially directed a verdict to Oxy with regard to some damage issues involving Exxon and Enogex. *See* Trial Transcript at 1666 (Apr. 23, 1991). The Court also fully directed a verdict

for defendant Williams Natural Gas Company. *See* Trial Transcript at 1662-66 (Apr. 23, 1991). At the close of all the evidence being introduced, the Court found that there was clear and convincing evidence of Oxy's misconduct. For the last time, the Court finds the evidence to be legally sufficient.

Procedurally, Oxy moved for a directed verdict at the end of plaintiffs' case in chief on April 22, 1991, but critically failed to reassert its motion at the end of all the evidence, and therefore the motion for JMOL cannot be successfully raised at the post-trial stage. *See Anderson v. United Tel. Co.*, 933 F.2d at 1502; *United States ex rel. Roper, IBG v. Reisz*, 718 F.2d at 1007; *Special Promotions, Inc. v. Southwest Photos, Ltd.*, 559 F.2d at 432; *see* advisory committee's note to former Fed. R. Civ. P. 50(b) ("A motion for judgment notwithstanding the verdict will not lie unless it was preceded by a motion for a directed verdict made at the close of all the evidence."). The motion is therefore deficient under both adjective and substantive measures.

B. Denial of Motion for New Trial

Oxy moves for a new trial based on the excessiveness of the punitive damages award and unfair surprise in that connection; misconduct of counsel; improper jury instructions; and surprise regarding the Mosier Farms contract. None of these arguments has merit.

The Court finds that Oxy has waived its First Amendment and Equal Protection Clause arguments by not pressing them at trial. *See Cunningham v. Healthco, Inc.*, 824 F.2d 1448, 1458 (5th Cir. 1987) ("[D]efenses not raised or argued at trial are ordinarily waived by the parties failing to raise them."); *Mason v. Texaco, Inc.*, 741 F. Supp. 1472, 1518 (D. Kan. 1990) (failure to object on constitutional grounds is a waiver), *aff'd in part and modified in part, remanded for remittitur or new trial*, 948 F.2d 1546 (10th Cir. 1991), *petition for cert. filed*, 1991 U.S. App. LEXIS 27,011 (U.S. Mar. 9, 1992). There was no specific objection made by Oxy concerning a requisite element of falsity with regard to its commercial speech.

Oxy's speech was not the type of commercial speech as defined in *Virginia State Bd. of Pharmacy v. Virginia Citizens*

Consumer Council, Inc., 425 U.S. 748, 771 (1976) (price advertising); instead it was intended maliciously to interfere with legitimate commerce. Also, *Gertz v Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) does not support the limitation of an award of punitive damages against a corporation for tortious interference with contracts or prospective business advantage. Defamation is irreconcilable with the causes of action before this Court, because defamation has the potential of punishing unpopular ideas, which is abrasive to the Constitution. *Id.* Oxy has unpersuasively attempted to transpose First Amendment defamation law on to the law of tortious interference. Further, the attempt is imprecise at best because at issue here is a matter of purely private concern, which occupies a subordinate position on the scale of First Amendment values, and thus has reduced protection. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 & n.5 (1985). Punitive damages are supportable without a showing of actual malice in a purely private circumstance. *Id.* at 761.

Oxy's speech did not rise to the dignity of constitutional protection. In fact, certain utterances were tainted by fraud. The jury more likely than not found that Oxy fraudulently induced plaintiffs to enter certain contracts; other speech was malicious. *See Berry v. Stevens*, 166 Okla. 124, 124, 31 P.2d 950, 950 (1934) (per curiam) (Court's first syllabus) ("Fraud destroys the validity of everything into which it enters.").

Oxy's representative, Joe Garrett, repeatedly made oral and written communications to third-party gas purchasers designed to interfere with existing or prospective CTR Sales contracts, and threatened legal action if the third parties conducted any business with plaintiffs. The communications were less than truthful. The jury had substantial evidence before it from which to find that Joe Garrett intentionally failed to inform the third parties that Oxy was claiming an exclusive right to buy from plaintiff under terminated or expired contracts. Oxy provided to the third parties contracts in which Oxy was not a party and improperly asserted contractual rights under those contracts.

Under Oklahoma law when a person speaks there is a duty to disclose all known facts so as to not convey a false impression.

See id., 168 Okla. at __, 31 P.2d at 955; *see also Uptegraft v. Dome Petroleum Corp.*, 764 P.2d 1350, 1353-54 (Okla. 1988) (within context of a cotenancy); *Mulkey v. Morris*, 313 P.2d 494, 500 (Okla. 1957) (within context of a partnership). Oxy's representative breached this duty by not informing the third parties that: 1) Oxy had defrauded plaintiffs; 2) Oxy had improperly deducted gathering fees and thus materially breached certain contracts; and 3) Williams Natural Gas Company's contracts had been terminated, thereby automatically terminating Oxy's processing agreements. *See, e.g.*, Trial Transcript at 869-70 (Apr. 18, 1991); and 1669 (Apr. 23, 1991). Oxy also omitted other pertinent information that would have provided a complete and honest picture.

The Court further concludes that plaintiffs' counsel did not commit the degree of prejudicial misbehavior, including violation of this Court's Order in Limine regarding price-fixing litigation brought against Oxy by government agencies, that requires a new trial. Focused into perspective, this infraction was only a few words during a trial that spanned three weeks. The matter was stricken by the Court and the jury was admonished to disregard it. *See* Trial Transcript at 33 (Apr. 8, 1991); and 1463 (Apr. 23, 1991).

At trial, the Court twice made an offer to defendants to declare a mistrial on this issue, and twice Oxy argued that a mistrial was unnecessary. *See* Trial Transcript at 1418-19 (Apr. 22, 1991); and 1463-64, 1469-70 (Apr. 23, 1991). Oxy never offered any alternative remedy, except to request that the issue not be addressed any further in front of the jury. The Court granted that request and essentially gave Oxy everything for which it asked. Now, Oxy asks for more; in view of a particularly unpleasant verdict, Oxy believes that a new trial is necessary after all. This argument has now lost all force, and any defect that the Court might previously have been receptive to cure has long since been waived.

There was no objection to counsel's characterization of Oxy's witnesses, and the Court finds no error in this regard. The Court finds that the Mosier Farms contract claim was fairly contemplated within the Pretrial Order in the manner agreed to

by the parties. Oxy withdrew its objection at trial. The pertinent evidence was introduced on the first day of a trial that spanned three weeks. Plaintiffs' witnesses were thoroughly cross-examined and there was an attempted impeachment. No continuance was requested, and the Court rejects Oxy's claim of surprise. *See Marino v. Otis Eng'g Corp.*, 839 F.2d 1404, 1411 n.13 (10th Cir. 1988) (the cross- examination did not bear the marks of one who was surprised). Finally, Oxy produced evidence at trial that it had incurred lost profits and anticipated larger losses in the future, but the jury considered this evidence in reaching its determination. That determination need not be upset.

C. Due Process Safeguards

The jury award in this case meets the requirements of due process by three separate measures.

1. Application of Oklahoma's Statutory Procedure Requiring Redundant Scrutiny of the Evidence by Independent Triers of Fact that includes a Heightened Burden of Proof.

First, on the record at trial, the Court, found that there was clear and convincing evidence that showed Oxy was responsible for conduct evincing oppression and a wanton and reckless disregard of plaintiffs' rights. Consequently, the Court lifted the cap on punitive damages. Trial Transcript at 2068-69 (Apr. 25, 1991); *see* 23 Okla. Stat. § 9 (when jury may give exemplary damages). The Oklahoma Legislature has instituted this procedural safeguard to adequately insure that punitive damages awarded under state law are not excessive, and that ample due process safeguards are built into the judicial process. *See Marshall v. El Paso Natural Gas Co.*, 874 F.2d at 1382-84 ("In 1986 the Oklahoma legislature amended its punitive damages statute, 23 Okla. Stat. Ann. § 9 (1971), limiting the amount of punitive damages to the amount of actual damages awarded unless the court first should find clear and convincing evidence of punitive acts prior to submitting the issue to the jury, in which case the limit of punitive damages to actual damages would not apply.").

Under proper circumstances the district court can even set a cap beyond the amount of actual damages on the award of punitive damages. For example, in *John A. Henry & Co. v. T. G. & Y. Stores Co.*, 941 F.2d 1068, 1070, 1073 (10th Cir. 1991), the Tenth Circuit recognized a wrongful interference with contract claim that arose from this district. The trial court lifted the cap, but placed a $2 million limit on punitive damages. The jury returned a verdict of $100,000 for actual damages and $2 million for punitive damages, a 1:20 ratio. In rejecting defendant's argument that the trial court invaded the province of the jury by setting a certain limit on the award, the Tenth Circuit concluded by stating "[w]e see no error or improper suggestion in this form. If any prejudice occurred, it was to [plaintiff] because the jury was not permitted to exceed the $2,000,000." *Id.* at 1073.

The Court believes that the Oklahoma statutory framework is constitutional and is not in need of change; however, if any change to this scheme is found to be warranted, then it should be by the state legislative branch, and not by the judiciary. *See Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377, 1384 n.12 (5th Cir. 1991) (on remand from the Supreme Court for reconsideration in light of *Pacific Mut. Life Ins. Co. v. Haslip*, ___ U.S. ___, 111 S. Ct. 1032 (1991), and noting that it is up to the legislature to set forth exact proportionality guidelines for punitive damage awards); *compare Flockhart v. Wyant*, 467 N.W.2d 473, 475 (S.D. 1991) (finding statute similar to that of Oklahoma was constitutionally adequate) *with Fleming Landfill. Inc. v. Garnes*, 413 S.E.2d 897, ___, No. 20284, 1991 W. Va. LEXIS 215, 1991 WL 258826 (W. Va. Feb. 13, 1992) (as corrected) (adopting into West Virginia law the punitive damages factors noted in *Pacific Mutual*).

Had the Oklahoma Legislature wanted to place an arbitrary cap on punitive damages to cover every conceivable circumstance, then it might have done so. Instead, there was a purposeful legislative decision to keep the ceiling open-ended. Consequently, higher punitive damages may be awarded when warranted by the facts in light of the state's purposeful interest in individualized assessment of appropriate deterrence and punishment. *See Mason v. Texaco, Inc.*, 948 F.2d at 1559

(citing *Pacific Mut. Life Ins. Co. v. Haslip*, ___ U.S. at ___, 111 S. Ct. at 1043-44).

Another procedural safeguard under Oklahoma law is there can be no award of punitive-damages without recovery of actual damages. *Phillips Mach. Co. v. LeBlond, Inc.*, 494 F. Supp. 318, 325 (N.D. Okla. 1980) (citing *Moore v. Metropolitan Utils. Co.*, 477 P.2d 692, 694 (Okla. 1970)). (However, punitive damages may be awarded in the event nominal damages are obtained. *See Spaeth v. Union Oil Co.*, 762 F.2d 665, 866-67 (10th Cir. 1985) (appeal after remand), *cert. denied*, 476 U.S. 1104 (1986)).

In determining the punitive damages issue at trial, the Court, in its role of trier of fact, objectively weighed the evidence, judged the credibility of the witnesses and assigned them weight. The Court determined that plaintiffs met their burden of proving by clear and convincing evidence that Oxy oppressively and recklessly disregarded plaintiffs' rights, so as justify lifting the punitive damages cap. *See* Trial Transcript at 2068-69 (Apr. 24, 1991). Subsequently, the jury, in its separate role of trier of fact, independently found by a preponderance of the evidence that Oxy tortiously interfered with plaintiffs' contracts and further tortiously interfered with plaintiffs' business relations with others. The Court reject's Oxy's argument that this procedure may infringe on its right to a trial by bury. The jury consequently awarded punitive damages. *See Marshall v. El Paso Natural Gas Co.*, 874 F.2d at 1382-84 (setting forth the statutory framework for determining punitive damages in Oklahoma). There was substantial evidence to justify the jury's determination.

The Court is mindful that punitive damages are not wholly favored in the law because they constitute a windfall and may create the anomaly of excessive compensation, *see Las Palmas Assocs. v. Las Palmas Center Assocs.*, 235 Cal. App. 3d 1220, 1258, 1 Cal. Rptr. 301, ___ (Cal. App. Nov. 5, 1991), *review denied*, 1992 Cal. LEXIS 752 (Feb. 11, 1992), but punitive damages are deeply rooted in our legal system and if they are to serve their mission, then they should not be absorbed with little or no discomfort. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S.

238, 255 (1984); *see also Coryell v. Colbauch*, 1 N.J.L. 77 (1791) (first reported American case involving punitive damages). Even a multi-million dollar punishment may be viewed as a calculated risk by a huge corporation in the seedy politics of coercion of smaller businesses that cannot financially risk litigation despite a sincere belief that they have been wronged. In contrast, a judgment of $30 million against this defendant under the justifying circumstances of this case sends a sharp, but certainly not devastating, lesson of deterrence to this defendant and any other potential defendant who is like-minded and similarly situated.

2. Well-Drawn Limits on Jury Discretion.

Second, the discretion of the jury was sufficiently tempered by the Court's purposefully crafted instructions. The jury's discretion in setting punitive damages was not unlimited, and was instead confined to deterrence and retribution. *See Heideman v. American Family Ins. Group*, 163 Wis. 2d 847, ___, 473 N.W.2d 14, 23 (App. 1991) (citing *Pacific Mut. Life Ins. Co. v. Haslip*, ___ U.S. at ___, 111 S. Ct. at 1044). The Supreme Court has stated in pertinent part:

> The discretion . . . is no greater than that pursued in many familiar areas of the law as, for example, deciding "the best interests of the child," or "reasonable care," or "due diligence," or appropriate compensation for pain and suffering or mental anguish. As long as the discretion is exercised within reasonable constraints, due process is satisfied.

Pacific Mut. Life Ins. Co. v. Haslip, ___ U.S. at ___, 111 S. Ct. at 1044.

The eight-person jury—two more than legally required—deliberated for a day and a half, and on April 30, 1991 returned a unanimous verdict for plaintiffs for $269,000 in actual damages, and $30 million in punitive damages. The jury was attentive during trial and approached its job seriously, as demonstrated by the fact that at one point during deliberations the jury requested to see the blow-ups of certain exhibits, and additionally asked to view certain depositions. *See* Trial

Transcript at 1352 (Apr. 23, 1991). The jury's conduct and demeanor in the Court's view, were inconsistent with any exhibitions that would suggest passion or prejudice. To the contrary, the jurors were calm and rational. There is a strong presumption, unless there is evidence in contradiction, that the jury followed the Court's instructions in reaching its verdict. *See Rasmussen Drilling, Inc. v. Kerr-McGee Nuclear Corp.*, 571 F.2d at 1149, 1155 ("Appellate courts do not impute to a jury the inability to understand correctly the totality of the trial court's instructions, even in a complicated case, nor will courts impute nonfeasance, in the form of disregard of the trial court's instructions, to a jury. . . . It is presumed that jurors will be true to their oath and conscientiously observe the instructions and admonitions of the Court.").

The Court instructed the jury that plaintiff must show that the acts complained of were oppressive, wanton, or malicious. Jury Instruction No. 41 at 1 (Punitive Damages). Maliciousness was defined as being prompted or accompanied by hatred, ill will, or spite toward the injured person individually. Wantonness was defined as an act done in a reckless or callous disregard of, or indifference to, the rights of the injured party. Oppressiveness was defined as an act that injures, damages or otherwise violates the rights of another person with unnecessary harshness or severity, as by misuse or abuse of authority or power, or by taking advantage of some weakness, disability or misfortune of another person. *Id.* at 1-2.

The jury was cautioned that punitive damages were not to be construed as compensation to the prevailing party, but rather as punishment for misconduct and to serve as an example to others to deter them from similar conduct. *Id.* at 1. The Court instructed the jury that they *may* award punitive damages, but if so then only with sound reason and calm discretion, and not on the basis of sympathy, bias or prejudice. *Id.* at 2. In instructing on damages in general, the Court emphasized that any award must be just and reasonable, and not speculative, but instead must be based on the evidence introduced. Jury Instruction No. 36 at 2 (Damages). The Court took away from the jury those portions of plaintiffs' claims where the damages were too speculative or unwarranted. *See* Trial Transcript at 288-89 Apr.

12, 1991); 1365-68 (Apr. 22, 1991); and 1676, 1680 (Apr. 24, 1991). Further, the jury was instructed that punitive damages must bear some relationship to the injury caused by the offensive conduct as well as the conduct itself, but did not necessarily need to bear any relationship to the amount of actual damages awarded. Jury Instruction No. 41 at 2.

The Court believes that its handcrafted deliberation instructions placed meaningful procedural due process constraints on the discretion of the jury to award excessive punitive damages. *See Pacific Mut. Life Ins. Co. v. Haslip*, ___ U.S. at ___ & n.1, 111 S. Ct. at 1037 & n.1; *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1097-99 (5th Cir. 1991) (the requirements are limits on jury discretion and adequate post-trial review), *petition for cert. filed*, 1991 U.S. App. LEXIS 29,573 (U.S. Feb. 28, 1992). Oxy argues that its constitutional rights were abridged by the punitive damages instruction, but the Court agrees with plaintiffs that this argument has a bit of crocodilian flavor since Oxy was willing to use the same instruction to its advantage with regard to its conversion counterclaim that was dismissed by the Court at trial. *See* Trial Transcript at 1986, 2045 (Apr. 25, 1991); Oxy's Proposed Jury Instructions at 125, 137 (Mar. 6, 1991).

3. Post-Trial Intensive Review.

Third, the Court has conducted this post-trial review of the award and finds it to be well-grounded in the evidence and not excessive under all of-the circumstances; and it is reasonable in consideration of the character and degree of Oxy's wrongdoing, and the necessity of preventing similar conduct by not only this defendant but by others as well. *See Adams v. Murakami*, 54 Cal. 3d 105, ___, 813 P.2d 1348, 1352, 284 Cal. Rptr. 318, 322 (1991) (en banc) ("'The channeling of just the correct quantum: of bile to reach the correct level of punitive damages is, to put it mildly, an unscientific process complicated by personality differences."' (quoted citation omitted)).

a. Reasonableness of Award.

There are four factors to consider in determining the reasonableness of an award of punitive damages under Oklahoma law. These factors shall be analyzed in turn.

i. The Award is justified by the Cause and Extent of Plaintiffs' Injury.

The first factor to consider in determining reasonableness is the cause and extent of plaintiffs' injury. *See Hobbs v. Watkins*, 481 P.2d 746, 754 (Okla. 1971); Trial Transcript at 1370-77 (Apr. 22, 1991); and 1560-65 (Apr. 23, 1991). In this case there was a purely commercial injury. Plaintiffs' cause of action were for tortious interference with existing contracts and tortious interference with prospective business relations. Both of these actions have contractual origins, but tortious misconduct was at work. Plaintiffs claim that their business was almost totally decimated by Oxy. *See* Trial Transcript at 283-84 (Apr. 12, 1991). The jury had evidence before it to find that Oxy deliberately shut-in plaintiffs' livelihood, and was less than truthful to third parties when plaintiffs attempted to conduct business with them. *See, e.g.*, Trial Transcript at 260, 282-83 (Apr. 12, 1991); 694 (Apr. 17, 1991); 1231, 1234-35, 1237, 1242 (Apr. 19, 1991); and 2054 (Apr. 25, 1991).

The jury had to find that Oxy's conduct was oppressive, wanton or associated with ill will or spite toward plaintiffs. *See* Jury Instruction No. 41 at l (Punitive Damages). Oxy's behavior had to be found to be reckless or with callous disregard and indifference to the rights of plaintiffs. The jury had to find that Oxy intentionally and maliciously induced third parties to either fail or to refuse to perform contracts with plaintiffs, or find that Oxy otherwise intended to deprive plaintiffs of their expected benefits under the contracts. *See* Trial Transcript at 2052 (Apr. 25, 1991); Jury Instruction No. 21 at 1 (Interference With Existing Contract- Third Element).

The jury found that Oxy's conduct lacked justification, privilege or excuse when they found the counterclaim devoid of merit. *See* Jury Instruction Nos. 21 at 2-3 and 23 at l (Elements of Liability for Plaintiffs' Second Claim of Interference With Prospective Contractual Business Relations). The jury particularly had to find in this regard that Oxy did not have an

honest intent and purpose of fairly bettering its own business, but instead found Oxy's purpose was to harm plaintiffs or wrongfully destroy honest competition. *See* Jury Instruction No. 21 at 1. The jury additionally had to find that Oxy did not have a legitimate economic interest in the subject matter of the relevant contract nor was Oxy seeking to protect its own contractual rights that might have been equal to or superior to the rights of plaintiffs. *See id.* at 3. The jury further had to conclude that Oxy's behavior was improper after balancing the evidence concerning the nature of the conduct, Oxy's motives, the interests interfered with, the interests sought to be advanced by tee interference, the social interests served by protecting either party's interest, the relationship between the parties, and the proximity or remoteness of Oxy's conduct to the disruption of the subject contracts. *See id.*

The Court rejects Oxy's argument that it was unduly surprised by plaintiffs' cause of action for tortious interference of prospective business advantage, which Oxy argues is relatively new in Oklahoma. No legitimate business would consider Oxy's conduct to be proper—certainly plaintiffs did not think it so and if Oxy is suggesting that it would have reformed its misbehavior had it known it might be susceptible to a significant punishment, then that is precisely the point that must be conveyed to deter others. *See* 76 Okla. Stat. § 1 ("Every person is bound, without contract, to abstain from injuring the person or property of another, or fringing upon any of [another's] rights."); *Restatement (Second) of Torts*, § 766B (1989) (Interference With Prospective Contractual Relations).

On the counterclaim that made it to the jury, Oxy claimed a $4 million economic loss based on its purported contractual rights to receive casinghead gas from plaintiffs' wells, which plaintiffs attempted to sell to third parties. Had Oxy prevailed on its counterclaim, then it would have had a complete defense to plaintiffs' claims. However, when plaintiffs' claims and Oxy's counterclaim are superimposed, the failure of proof on the counterclaim proves Oxy's injurious motive in a most convincing way. The jury was entitled to react to the fact that Oxy took a complete change of position with respect to the coterminous provisions of the contracts and whether the contracts retained

validity. *See, e.g.*, Trial Transcript at 231-32 (Apr. 12, 1991); 658 (Apr. 16, 1991); 1228, 1242-43 (Apr. 19, 1991); and 2047-48 (Apr. 25, 1991). The counterclaim thus became counter-productive and was no doubt found to be offensive because Oxy asserted contractual rights under contracts that the jury probably found were procured by fraud in the first instance. *See, e.g.*, Trial Transcript at 2048-49, 2051 (Apr. 25, 1991); and at 30-31 (Sept. 13, 1991). Plaintiffs showed that Oxy failed to perform material obligations set forth in the contracts, including failure to pay for the gas taken, and improperly charged a gathering fee. *See. e.g.*, Trial Transcript at 283 (Apr. 12, 1991); 661 (Apr. 16, 1991); 2048 (Apr. 25, 1991); Jury Instruction No. 28 at 1-3 (Oxy's Breach Of Contract Counterclaim-Agreements And Issues Involved). After thoughtful consideration, the jury absolutely rejected Oxy's counterclaim. The jury had substantial evidence before it to find by clear and convincing evidence that Oxy fraudulently induced plaintiffs into entering certain contracts with regard to the Mosier wells. *See* Jury Instruction Nos. 34 & 35.

No where in its extensive briefing has Oxy suggested that the jury reached the wrong result on its counterclaim. What surfaces is the disturbing conclusion that plaintiffs not only had to risk substantial legal costs to bring this suit, but were also faced with the possibility of a multi-million dollar adverse judgment on Oxy's counterclaims, which proved to be meritless. Just prior to trial, Oxy had been seeking nearly 7 million dollars in damages from plaintiffs. *See* Trial Transcript at 1855-56 (Apr. 24, 1991). Oxy was also pursuing its rights under terminated contracts in state court. *See id.* at 1789. Such tactics by a powerful tortfeasor serve to freeze all but the most intrepid of wronged parties. *See Spaeth v. Union Oil Co.*, 762 F.2d at 866 (the risk created by defendant's conduct is a substantial factor to consider in calculating punitive damages); *O'Gilvie v. International Playtex. Inc.*, 821 F.2d 1438, 1447 (10th Cir. 1987) (probable litigation expense may be factored into the punitive damages calculus) (citing Kansas law), *cert. denied sub nom., Playtex Holdings Inc. v. O'Gilvie*, 486 U.S. 1032 (1988). It is fundamentally fair and just that this risk factor should be taken into account when assessing the totality of Oxy's conduct.

Finally, there was substantial evidence of the injury to plaintiffs caused by Oxy's conduct. The evidence showed that the injury was manifested in significant delays by third parties in hooking up to plaintiffs' wells, causing substantial damages to plaintiffs. For instance, Gary Baker testified that Oxy's conduct caused Union Texas to not buy plaintiff Continental Trends' gas, and Joe Garrett's tortious contact caused Union Texas to delay in purchasing Farrar Oil Company's gas. *See. e.g.*, Trial Transcript at 1301 (Apr. 22, 1991); and 2053-54 (Apr. 25, 1991). Other delays were caused as well. *See e.g.*, *id.* at 1334-35, 1337 (Apr. 22, 1991). There was substantial evidence that Oxy shut-in plaintiffs' wells. *See. e.g.*, *id.* at 245, 247, 257, 258 (Apr. 12, 1991); 673 (Apr. 16, 1991).

At trial, Oxy admitted to making mistakes; otherwise Oxy has been utterly remorseless. *See id.* at 2049, 2061 (Apr. 25, 1991). Coercing weaker competitors to keep them in their place was Oxy's method of conducting business. *See. e.g.*, *id.* at 1231 (Apr. 19, 1991). There is no question that plaintiffs proved defendant Oxy's injurious motive. The jury was obviously moved by the repugnancy of the totality of Oxy's conduct. The circumstances therefore beg the question: exactly how many tens of millions of dollars requite Oxy's incorrigibility? The jury answered three. This Court cannot disagree with that assessment.

ii. The Award Is Justified by the Harm Caused to Society.

The second factor to consider in determining the reasonableness of a punitive damages award is the harm Oxy's conduct caused to society in general. *See Oller v. Hicks*, 441 P.2d 356, 360 (Okla. 1967) ("The basis for allowance of punitive damages rests upon the principle that they are allowed as punishment for the benefit of society as a restraint upon the transgressor, and a warning and example serving as a deterrent to commission of like offenses in the future."). The jury found that Oxy's intent was to improperly injure plaintiffs and thus wrongfully destroy honest competition. *See* Jury Instruction No. 21 at 3. It was therefore proper that the jury made an example out of Oxy in order to deter others from such grievous behavior

that ultimately has an adverse economic impact on the public—the ultimate consumer of vital energy resources through public utilities.

At the same time, Oxy's conduct incrementally damages the United States in its present struggle to remain a global economic power. Of course, Oxy is not itself the cause of our society's economic problems, but Oxy's punishment does serve as an example to others to restrain them from crossing the boundary of unlawful interference and suppression of free enterprise. Our economic system's structure is as endangered by the nature of Oxy's conduct as by wrongful deaths or environmental hazards that Oxy insists should be reserved for the highest penalties. It is true that Oxy's conduct does not create the personal tragedy represented in those other species of torts, but from a macro-perspective Oxy's misconduct is insidious because it rips at fair competition itself.

iii. The Award Is Justified by Oxy's Profit Incentive.

The third factor to consider is the magnitude of Oxy's profit incentive. Oxy itself introduced evidence that suggested that its profit incentive was in excess of $4.25 million. Plaintiffs argue that this amount does not include the gas that plaintiffs were unable to move from the system and were forced to process at the Rodman Plant due to Oxy's malicious interference. Plaintiffs contend that Oxy stood to ultimately profit by approximately $10 million from its unlawful conduct at the subject gas-processing plant, and therefore the award exceeds that amount by no more than three times. But, Oxy could only directly profit by a factor of 50% of the total amount as Oxy had a co-owner, Oryx. Therefore a more accurate multiplier would be six. However, the benefits that Oxy indirectly realized by unjustly enriching its co-owner defy quantification.

The evidence additionally suggests that Oxy improperly deducted gathering fees in the tens of millions of dollars. *See. e.g.*, Trial Transcript at 2048 (Apr. 25, 1991). Plaintiffs argue that Oxy's misconduct not only placed their business on the verge of collapse, but there was evidence that Oxy unjustly treated other producers in a similar manner and profited by

millions of dollars. There is evidence that 6,000 contracts were affected, involving 100,000 producers. *See, e.g.*, Trial Transcript at 1756 (Apr. 24, 1991).

If left unchecked, Oxy could have profited by $80-90 million by the year 2010, according to plaintiffs. The large number of independent producers potentially affected therefore further substantiates a significant punitive damages award. *See O'Gilvie v. International Playtex, Inc.*, 821 F.2d at 1447; *Silkwood v. KerrMcGee Corp.*, 769 F.2d 1451, 1460 (10th Cir. 1985), *cert. denied*, 476 U.S. 1104 (1986). This potentially widespread injury was a reasonable inference for the jury to draw from the evidence. Oxy disputes plaintiffs' ultimate conclusions, but the burden falls on Oxy with regard to overturning the jury award and that burden has not been met. "A verdict awarding punitive damages is not considered to be unconstitutionally excessive until the defendant against whom it has been rendered produces evidence that the amount is greater than a sum necessary to accomplish society's goals of punishment and deterrence." *Fraser v. Reynold's*, 588 So. 2d 448, 452 (Ala. 1991).

Oxy's corporate representative at trial, Joe Garrett, was not a strategic asset with respect to Oxy's culpability. In fact, the evidence admitted at trial portrayed both the representative and Oxy in a particularly bad light. *See* Trial Transcript at 31 (Sept. 13, 1991). Significantly, there was evidence that Oxy's representative believed, in effect, that Oxy could not allow plaintiff Continental Trend to get away with asserting its rights, or everybody else would try to assert theirs. Garrett specifically testified: "We have approximately 500 or so contracts at Rodman, and we live by the contracts that we sign with producers. *And if we let this happen with one producer, we could expect for everybody to want to jump right in the middle of us and do the same thing.* So we were trying to protect our plant." Trial Transcript at 1789 (Apr. 24, 1991) (emphasis supplied).

The indelible impression was that Oxy was concerned that the producers were getting restless; and therefore Oxy believed that it better get out there and subdue them, and did. The Court observed the jury during Joe Garrett's testimony and it was clear

that the jury viewed him with justifiable disapprobation. *See* Trial Transcript at 30 (Sept. 13, 1991) (hearing on motions). The jury could well conclude that intimidation was Oxy's method of controlling competitors. Oxy's representative might have single-handedly assured a substantial punitive damages award against Oxy. After his testimony, Oxy's representative, who sat at counsel table, was a constantly visible symbol of corporate misconduct, especially so during the final week of trial while a parade of witnesses testified as to his own misconduct. *See id.* at 30-31.

iv. Oxy's Wealth Substantially Justifies the Award.

The last factor for the Court to consider in determining the reasonableness of the punitive damages award is Oxy's wealth. *See generally*, Annotation, *Punitive damages: relationship to defendant's wealth as factor in determining propriety of award*, 87 A.L.R. 4th 141, § 31 (1991) (Net worth of assets of $1 billion or more.). Based on an equal protection foundation, Oxy argues that the jury should not have even been allowed to consider its net worth at the liability stage. Plaintiffs moved for bifurcation on Oxy's counterclaim, but Oxy never once asked for bifurcation, which would have been a rudimentary step for preserving an equal protection objection. *See Smith v. Lightning Bolt Prods., Inc.*, 861 F.2d 363, 373-74 (2d Cir. 1988).

On March 6, 1991, Oxy did file a motion in limine to exclude evidence of its parent corporation's net worth from being introduced, and to exclude evidence of its own financial position and condition *until after plaintiffs proved a prima facie showing of liability*. It was Oxy's position that such evidence was not even discoverable until liability was established. During the pretrial conference on April 1, 1991, the Court stated that it did not have enough information to make a decision at that time on the motion in limine and would simply defer an examination of punitive damages until after a liability determination. However, as a practical matter the motion was essentially granted because plaintiffs not only made a prima facie showing of liability, but after hearing arguments the Court found such by clear and convincing evidence in the record on April 25, 1991.

See Trial Transcript at 2046-69 (Apr. 25, 1991). Thereafter, the Court ordered Oxy to produce evidence of its net worth by the following day. *See* Trial Transcript at 2069-70 (Apr. 25, 1991).

The Court rejects on the merits Oxy's contention that its right to equal protection was compromised by the jury being informed of its net worth at the liability stage. While Oxy argued in its motion in limine that such evidence would be prejudicial, there was no argument that it should be excluded on the constitutional grounds of equal protection nor excluded prior to the jury's verdict on liability. The basic issue raised is whether the jury would be unduly prejudiced by learning of the vast wealth of Oxy and then consequently return an adverse verdict on liability. This argument loses much of its force in the oil and gas context of the present suit, which is essentially a dispute between sophisticated business entities. A defendant's wealth in this context plays a decisively less prejudicial role than in such contexts, for example, as a manufacturer's product liability case where greed has perhaps placed profits above concerns for life and limb.

Oxy's argument is also curious on a logical plane. In effect, Oxy must convince this Court that the jury found liability on a preponderance standard, incited by prejudice, when this same Court previously determined that there was clear and convincing evidence of liability for punitive damages without the benefit of the evidence that Oxy asserts is so prejudicial. *See* Trial Transcript at 2069 (Apr. 25, 1991). In sum, the Court simply does not find that a constitutional right was abridged in this regard. *See also City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270-71 (1981). Again, this fundamental matter is best left to the legislature to change, if indeed, any change is warranted. Oxy likewise failed to raise this issue at trial and a party may not withhold assertion of a trial error and then urge the error upon review if the verdict proves unfavorable. *See Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990) (error should be raised in a "pragmatically sufficient time."); *Nanda v. Ford Motor Co.*, 509 F.2d 213, 222 (7th Cir. 1974); *Skogen v. Dow Chem. Co.*, 375 F.2d 692, 703 (8th Cir. 1967) ("It is the most fundamental rule of appellate procedure that a party may not sit idly by and allow the trial court to commit

error, wait for a verdict, and complain of the error only if the verdict is unfavorable."), *superseded by statute on other grounds*.

The jury was correctly instructed that it could consider defendant's net worth pursuant to Oklahoma law as one of many factors in determining the amount of punitive damages to award, but the award must be warranted by the evidence. *See Spaeth v. Union Oil Co.*, 710 F.2d 1455, 1460 (10th Cir. 1983), *appeal after remand*, 762 P.2d 865 (10th Cir. 1985); *cert. denied*, 476 U.S. 1104 (1986). Oxy failed to raise a contemporaneous objection based on any lack of specificity in the instructions and further failed to submit a more detailed instruction that it now insists was required. *See* Oxy's Proposed Jury Instructions at 125, 137 (Mar. 6, 1991). Oxy's objection has simply been waived on this point. *See Rogers v. Northern Rio Arriba Elec. Coop., Inc.*, 580 F.2d 1039, 1042 (10th Cir. 1978) ("It was only after an adverse jury verdict was returned that the matter assumed great importance . . . ."); Fed. R. Civ. P. 51 (objections to jury instructions must be requisitely specific).

In reviewing instructions, the court should " ' " ' "consider all that the jury heard and, from the standpoint of the jury, decide, "not whether the charge was faultless in every particular, but whether the jury was misled in any way and whether it had an understanding of the issues and its duty to determine th[o]se issues." ' " ' " *Estate of Korf v. A.O. Smith Harvestore Prods.*, 917 F.2d 480, 484 (10th Cir. 1990) (per curiam) (quoting *Robinson v. Audi NSU Auto Union Aktiengesellschaft*, 739 F.2d 1481, 1486 (10th Cir. 1984) (quoting *Durflinger v. Artiles*, 727 F.2d 888, 895 (10th Cir. 1984) (quoting *Alloy Int'l Co. v. Hoover-NSK Bearing Co.*, 635 F.2d 1222, 1226-27 (7th Cir. 1980) (and in turn quoting *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1100 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974))))). The review must be made " ' "in the light, not only of the instructions as a whole, but of the allegations of the complaint, ;the opening statements, the evidence, and the closing arguments." ' " *Estate of Korf v. A.O. Smith Harvestore Prods.*, 917 F.2d at 484 (quoting *Joyce v. Atlantic Richfield Co.*, 651 F.2d 676, 682 (10th Cir. 1981) (in turn quoting *Alloy Int'l*

Co. v. Hoover-NSK Bearing Co., 635 F.2d at 1226)). The instructions withstand review.

Significantly, Oxy never gave the Court any notice at trial of the problem of which it now complains nor the opportunity to correct any perceived error. *See Taylor v. Denver & Rio Grande W. RR. Co.*, 438 F.2d 351, 253 (10th Cir. 1971) (the purpose of Rule 51 is to prevent a litigant from taking advantage of an error that could have been rectified if brought to the court's attention). During closing arguments, Oxy was permitted the opportunity to argue what other factors the jury might consider in reaching their determination. Opportunity once lost is forever lost. If any error is detectable, then it is harmless; so too with the Court's refusal to instruct on Oxy's theory of its case. *See* Fed. R. Civ. P. 61 (harmless error doctrine).

Oxy's net worth is a substantial factor for the jury to consider in determining the amount of punitive damages. *See Spaeth v. Union Oil Co.*, 762 F.2d at 866. In this regard, Oxy is a subsidiary of a giant American corporation—OXY Oil and Gas USA, Inc., which had a net worth of $1.756 billion in 1990 according to plaintiffs' Exhibit No. 256. Oxy's grandparent corporation, Occidental Petroleum Corporation of Los Angeles is reputed to be one of the Top Ten oil companies in the nation. *See generally*, Ronda Fears, *OXY Judgment May Be Largest In State History*, The Journal Record, May 3, 1991, at 1 (located at Oxy's brief at Ex. B). The financial worth of a parent corporation is generally irrelevant in assessing punitive damages on a subsidiary unless the corporate veil is pierced. However, as a practical matter, it was Oxy that pierced its parent's corporate veil by introducing evidence that commingled Oxy's financial information with that of its parent.

Oxy submitted a belated net worth statement that was introduced *without objection*. That report indicated that in 1990 Oxy distributed $589 million of excess cash and $3.9 billion in assets to its parent corporation. The evidence indicated that Oxy's revenue for one week was $36 million. *See* plaintiffs' Ex. 256. During closing arguments, plaintiffs' counsel argued that Oxy should be penalized one week's revenue for its insufferable

conduct. The jury apparently accepted that argument and the result is just and rationally based. In light of all of the circumstances of this case, the Court cannot find the sum of $30 million to be unreasonable, nor grossly disproportionate to the severity of the offense, and the sum is especially reasonable in relation to the $6 billion in assets of defendant in 1989 before it distributed $4 billion to its parent in 1990—the year this case was filed. *See id.*

Oxy has attempted to introduce evidence at this stage to show that the evidence presented at trial was misleading and confusing with regard to its net worth. The Court has reviewed this proffered evidence, but it more properly should have been introduced at trial under the Oklahoma punitive damages framework so that it could be subjected to cross-examination and consideration by the jury. *Cf. Pacific Mut. Life Ins. Co. v. Haslip*, ___ U.S. at ___, 111 S. Ct. at 1044-45 (noting with approval that under Alabama law evidence of net worth is considered at the post-trial stage and upon appellate review, as opposed to the trial stage). The evidence of Oxy's net worth admitted at trial was not only uncontroverted, but there was no evidence proffered by Oxy at trial that plaintiffs' evidence in any form exaggerated Oxy's net worth. *See* Trial Transcript at 2075 (Apr. 25, 1991). Oxy allowed the strategic opportunity to introduce evidence on its financial condition to pass by. *See Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 408-09 (5th Cir.), *cert. denied*, 478 U.S. 1022 (1986).

Oxy unreasonably failed to produce evidence of its net worth when it was repeatedly requested by plaintiffs during discovery, and this infraction surfaced during trial. Consequently, the Court ordered Oxy to immediately produce the information, and it was produced the following day. Now, Oxy argues for the first time that it was prejudiced by this requirement, but Oxy's wound was self-inflicted. Oxy argues that it was the Court's change of position on the timing of submission of damage evidence to the jury that resulted in a lack of preparation to present evidence of its net worth. However, as detailed above, the Court deferred examining punitive damages with regard to Oxy's motion in limine until after a prima facie liability determination. Therefore, it was Oxy's decision to not comply

with plaintiffs' discovery request on a reasonable basis that led to the vexation from which Oxy now claims it is afflicted. It is disingenuous in a trial of this magnitude for Oxy to feebly argue that its total lack of preparation to present evidence on punitive damages hinged on a ruling that the Court expressly stated that it did not have enough information on which to make a decision. Significantly, upon hearing the Court's ruling, Oxy did not request a continuance or make any other attempt to cure the alleged prejudice. *See Rasmussen Drilling, Inc. v. Kerr-McGee Nuclear Corp.*, 571 7.2d at 1154-55 (an appellant may not complain of errors that the appellant induced or invited).

Oxy's stratagem backfired, and any resultant damage was aggravated by Oxy's decision not to introduce any other evidence at trial with regard to its net worth, nor even address the issue during closing arguments. Oxy must now live with the consequences of its choices. *See Smith v. Lightning Bolt Prods., Inc.*, 861 F.2d at 373-74 (it is defendant's burden to produce evidence of its financial worth and failure to do so does not warrant reduction of punitive damages). The trial, which spanned three weeks, was not merely a dress rehearsal for Oxy to correct defects in its trial strategy that went awry.

In consideration of the defendant's net worth, the Court concludes that a substantial sum of punitive damages is reasonably necessary to deter future misconduct of this particular defendant. In this light, *under all of the circumstances of this case*, and *in this particular context* $30 million is still well short of the line of being such an extreme result as to jar this Court's constitutional sensibilities. *See Pacific Mut. Life Ins. Co. v. Haslip*, ___ U.S. at ___, 111 S. Ct. at 1043, *cited in, Alexander & Alexander, Inc. v. B. Dixon Evander & Assocs.*, 88 Md. App. 672, ___, 596 A.2d 687, 705 (Md. Ct. Spec. App. 1991); *Spaeth v. Union Oil Co.*, 710 F.2d at 1460 ("Absent an award that shocks the judicial conscience, the jury's determination of punitive damages is inviolate.").

b. Finding of a Lack of Excessiveness.

In *Pacific Mut. Life Ins. Co. v. Haslip*, ___ U.S. at ___, 111 S. Ct. at 1046, there was an award of $4,000 in actual damages for the deprivation of benefits under a life insurance policy, and

the ratio to punitive damages was 1:4; however, the Supreme Court also made an effort to note that the actual out-of-pocket expenses for purchasing the insurance compared to the punitive damages award approached a ratio of 1:200. Regarding these ratios the Supreme Court stated that "[w]hile the monetary *comparisons* are wide, and indeed, may be close to the line, the award here did not lack objective criteria." *Id.* (emphasis supplied). However, the Supreme Court wisely refused to find a "mathematical bright line" test of constitutionality. *Id.* at 1043. The Supreme Court correctly did not set forth an arbitrary rule of proportionality, and *expressly limited its review of the constitutionality of damages to the facts of the case before it. See Heideman v. American Family Ins. Group*, 163 Wis. 2d at ___, 473 N.W.2d at 22 (citing *Pacific Mut. Life Ins. Co. v. Haslip*, ___ U.S. at ___, 111 S. Ct. at 1043). The Supreme Court emphasized:

> "We need not, and indeed, we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus."

Ober v. Honda Motor Co. Ltd., 108 Or. App. 43, __, 814 P.2d 517, 522 (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, ___ U.S. at ___, 111 S. Ct. at 1043) (emphasis omitted), *review granted*, 312 Or. 525, 822 P.2d 1194 (1991); *see generally*, Francis N. Dougherty, Annotation, *Excessiveness or inadequacy of punitive damages in cases not involving personal injury or death*, 35 A.L.R. 4th 538, 598-607 (1985) & Supp. at 53-56 (1991) (Interference with business or business rights.).

A careful scrutiny of the ratio of actual damages to punitive damages is an objective starting point for determining the waterline of excessiveness, but a close ratio does not necessarily prove adequate in cases such as this one that are marked by extraordinary circumstances. *See Garland Coal & Mining Co. v. Few*, 267 F.2d 785, 791 & n.7 (10th Cir. 1959) ("While exemplary damages must bear some relation to the injuries

inflicted and the cause thereof, they do not necessarily bear any relation to the amount of damages allowed by way of compensation."). The limitations of the ratio litmus test are well illustrated by the following example that was expounded by the Alabama Supreme Court; that court considered a case after it was remanded by the United States Supreme Court in light of *Pacific Mutual*, which in turn had reviewed the seminal Alabama case—*Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989):

> A constitutionally permissible punitive damages award against a wealthy defendant, who engages in egregious conduct that fortuitously does little real harm but has the potential to do great harm, might involve a greater ratio of punitive damages to compensatory damages than that in this case. In contrast, a constitutionally permissible punitive damages award against a poor defendant, whose reckless conduct causes great actual harm but has little potential to cause other harm, might require a lower ratio of punitive to compensatory damages than that in this case. We find no compelling reason to set an arbitrary mathematical relationship between compensatory and punitive damages. *Imposing such a relationship would inevitably result in injustice, and we decline to impose it.*

Southern Life & Health Ins. Co. v. Turner, 586 So. 2d 854, 858 (Ala. 1991) (emphasis added).

There is certainly no assertion here that the amount of the award is excessive in the sense that it represents too large a portion of Oxy's net worth or that Oxy is unable to pay the judgment. In the present suit the actual damages award was $269,000, and the punitive damages award was $30 million, thus the ratio was more than 1:111. Plaintiffs contend that this amount is less than 1% of Oxy's net worth of $6 billion in 1989, and the Court is impressed by plaintiffs' analogy that, placed in proper perspective, the award is akin to a $1,000 award against a company that has a net worth of $100,000. *See Cash v. Beltmann N. Am. Co.*, 900 F.2d 109, 111 & n.3 (7th Cir. 1990). One benchmark of excessiveness is whether the award is a "dangerous financial drain." *Id.*; *Thiry v. Armstrong World*

Indus., 661 P.2d 515, 518 (Okla. 1983). There is no evidence before this Court, nor even the shadow of an inference, that Oxy will be seriously marked by its punishment.

Oxy argues that the ratios have been high in some cases but "relatively small in absolute terms." Oxy's reply brief at 4 (June 14, 1991); *compare e.g., Timmons v. Royal Globe Ins. Co.*, 653 P.2d 907, 909, 919 (Okla. 1982) (1:44 ratio approved—$1.5 million award), *appeal after remand*, 713 P.2d 589 (Okla. 1985); *Spaeth v. Union Oil Co.*, 762 F.2d 865, 866 (10th Cir. 1985) (upholding ratio of 1:114—$2 million award), *cert. denied*, 476 U.S. 1104 (1986); *Bradbury v. Phillips Petroleum Co.*, 815 F.2d 1356, 1366 (10th Cir. 1987) (ratios of 1:50,000 and 1:50 upheld—$50,000 and $25,000 respective awards); *Jones v. Lennington*, 629 P.2d 805, 807 (Okla. Ct. App. 1981) (noting in dictum that a ratio of 1:1 million might be permissible under particularly intolerable circumstances) *with Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152, 1156, 1177 (10th Cir. 1981) (on rehearing en banc) (ratio of 1:3 found to be excessive—$2 million award approved), *cert. denied*, 464 U.S. 824 (1983). But from the angle of justice, the Court submits that punitive damages in this case should avoid being "relatively small in absolute terms." The ratio of 1:111 in this case hopefully has significant leaning in absolute terms with relation to Oxy's wealth—and well it should.

The Court has scrutinized the proportionality of the actual damages to that of the amount of punitive damages in the instant case and does not find the award to be excessive. In *Eichenseer v. Reserve Life Ins Co.*, 934 F.2d at 1384; there was a 1:500 ratio between the actual damages award and the punitive damages award of $500,000. In affirming the judgment following remand from the Supreme Court in consideration of *Pacific Mutual*, the Fifth Circuit reasoned that the award was one third of one percent of defendant's net worth, and "[o]ne of the *fundamental* purposes of punitive damages is to deter a wrongdoer from future misconduct." 934 F.2d at 1384 (emphasis supplied); *cf. Mason v. Texaco, Inc.*, 948 F.2d at 1561 (The Tenth Circuit ordered a remittitur of $12.5 million of a $25 million award under the peculiar circumstance that a prior

jury had not awarded even one cent in punitive damages.). The Due Process Clause does not require punitive damage awards to be ineffectual and impotent. *See Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d at 1384; *see also Southern Life & Health Ins. Co. v. Turner*, 586 So. 2d at 858 (affirming trial court's acceptance of award of $499,000 with a ratio of 1:499 following the Supreme Court's remand in light of *Pacific Mutual*).

Under Oklahoma law, punitive damages are awarded to punish the wrongdoer, and therefore "Oklahoma does not require the amount of punitive damages to be in a particular ratio to the amount of actual damages." *Buzzard v. Farmers Ins. Co.*, 824 P.2d 1105, 1115 (Okla. 1991) (filed subsequent to, but not discussing, *Pacific Mutual*). Instead, the focus is on the harm that defendant's conduct caused to society; however, the Court may take the amount in actual controversy into account in determining the correctness of the punitive damage award. *Id.*; *accord Silkwood v. Kerr-McGee Corp.*, 769 F.2d at 1460 (under Oklahoma law the factors to be considered for assessing the excessiveness of a punitive damages award are risk of wrongful conduct, and deterrent effect; and although no proportionality is required, the analysis is not open ended as there must be a relationship to the injuries actually suffered by plaintiff and to society as a whole).

Oxy is correct that the damage award is large, but Oxy is incorrect that it is too large *under the circumstances of this case*. Punitive damages should be more than a nuisance; in the proper instance they must leave marks. *See Thiry v. Armstrong World Indus.*, 661 P.2d at 518 (the punishment function of punitive damages should sting); *Oller v. Hicks*, 441 P.2d at 360 (The jury's verdict will not be lightly interfered with in consideration of a claim of excessiveness).

V. CONCLUSION

The elaborate and labor-intensive procedures set forth above adequately satisfy Oxy's right to all the process that is due. Oxy's conduct was certifiably reprehensible. This Court found as much by clear and convincing evidence before the jury even retired to deliberate on the evidence. A substantial award of

punitive damages was necessary in this case in order to have a deterrent effect on a megacorporation of Oxy's stature. While sum is indeed substantial, it does not exceed the amount necessary to accomplish the meritorious goals of punishment and deterrence. Any lesser sum would sacrifice justice and fair play in the cost\benefit analysis of the business community and would jeopardize the democratic ideal of a robust free-enterprise system. For all of the above reasons, the judgment shall stand. Therefore, no basis to alter or amend the judgment is presented.

Accordingly, defendant Oxy USA, Inc.'s motion to alter or amend judgment, for remittitur, for judgment as a matter of law or for a new trial is DENIED.

IT IS SO ORDERED THIS 20th DAY OF OCTOBER 1992.

/s/ Wayne E. Alley
WAYNE E. ALLEY
UNITED STATES DISTRICT JUDGE

APPENDIX F

CONSTITUTION

OF THE

UNITED STATES OF AMERICA

AMENDMENTS

AMENDMENT 5

Criminal actions -- Provisions concerning -- Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 7

Trial by jury in civil cases.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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(2)

No. 96-1546

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CONTINENTAL TREND RESOURCES, INC., *et al.*,

Petitioners,

v.

OXY USA INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RULE 29.6 DISCLOSURE

The parent companies of OXY USA Inc. are Occidental Oil and Gas Corporation, Occidental Petroleum Investment Company, and Occidental Petroleum Corporation. OXY USA Inc. owns minority interests in Canadian Occidental Petroleum, Ltd., Occidental Chemical Investment (Canada) 1, and East Texas Salt Water Disposal Company. All other companies in which OXY USA Inc. owns an interest are wholly-owned subsidiaries.

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RESPONDENT'S BRIEF IN OPPOSITION

On May 8, 1995, OXY USA, Inc. ("OXY"), respondent in the present case, petitioned this Court in *OXY USA, Inc. v. Continental Trend Resources, Inc.*, No. 94-1838, to review the 1995 decision of the United States Court of Appeals for the Tenth Circuit affirming a $30,000,000 punitive damage award in favor of the present petitioners, Continental Trend Resources, Inc., et al. ("CTR"). On May 28, 1996, this Court granted the petition, vacated the judgment below, and remanded to the Tenth Circuit for reconsideration in light of *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996). *OXY USA, Inc. v. Continental Trend Resources, Inc.*, 116 S. Ct. 1843 (1996); Appendix to Petition for Writ of Certiorari ("Pet. App.") at 30a. On remand, the Tenth Circuit applied the analysis this Court enunciated in *BMW*, as this Court directed it to do, and concluded that the $30,000,000 punitive damage award, which was imposed to punish conduct that allegedly caused $269,000 in purely economic injury arising from a business dispute, was unconstitutionally excessive. The court remitted the award to $6,000,000, and gave CTR the option of a new trial in the event it rejected the remittitur.

While CTR and OXY can and do disagree as to whether the Tenth Circuit's remittitur is too large, or not large enough, that court's straightforward application of the *BMW* analysis to the unique set of facts before it presents no question for this Court's review. It is no different in that regard than the numerous other fact-specific decisions of other federal courts remitting punitive damage awards in

light of *BMW*.[1] This Court does not review such fact-bound applications of established law.

CTR's attempt to create a conflict between the Tenth Circuit's decision on remand and this Court's decision in *Gasperini v. Center for Humanities, Inc.*, 116 S. Ct. 2211 (1996), overlooks a critical distinction. The two decisions address entirely different issues. *Gasperini* involved federal appellate review of decisions concerning the excessiveness of *compensatory* damage awards as a matter of *state* law. That decision does not address, much less answer, the question in this case of federal *constitutional* review of *punitive* damage awards. The Tenth Circuit's appellate review of the punitive damage award in this case is consistent with every punitive damage decision by this Court. Indeed, any other mode of review would not have

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[1] *See, e.g., Creative Demos, Inc. v. Wal-Mart Stores, Inc.*, ____ F. Supp. ____, No. 91-1256C, 1997 WL 74203, at *8-11 (S.D. Ind. Feb. 7, 1997) (ordering new trial on punitive damages because $6,500,000 award was grossly excessive under *BMW* analysis); *Geuss v. Pfizer, Inc.*, No. 94-7059, 1996 WL 729048, at *9-12 (E.D. Pa. Dec. 17, 1996) ($150,000 award remitted to $17,500); *Florez v. Delbovo*, 939 F. Supp. 1341, 1349 (N.D. Ill. 1996) ($750,000 punitive award remitted to $275,000); *Iannone v. Frederic R. Harris, Inc.*, 941 F. Supp. 403, 414-15 (S.D.N.Y. 1996) ($250,000 award remitted to $50,000); *Utah Foam Prods. Co. v. Upjohn Co.*, 930 F. Supp. 513, 532 (D. Utah 1996) ($5 500,000 award remitted to $607,146); *Rush v. Scott Specialty Gases, Inc.*, 930 F. Supp. 194, 201-02 (E.D. Pa. 1996) ($3,000,000 award remitted to $300,000); *Schimizzi v. Illinois Farmers Ins. Co.*, 928 F. Supp. 760 (N.D. Ind. 1996) ($600,000 award remitted to $135,000).

conformed to this Court's order to reconsider the case in light of *BMW*.

CTR offers several theories in support of its contention that the Tenth Circuit did not properly conduct the *BMW* analysis. None have merit. But even if they did, CTR has failed to demonstrate that any alleged error conflicts with the decisions of other courts of appeals or presents questions of particular importance. For example, CTR argues that the Tenth Circuit established a ceiling of a 10 to 1 ratio of punitive damages to actual and potential harm in commercial cases, and that this purported ruling violates due process. This argument misrepresents the Tenth Circuit's decision, which does *not* establish a fixed ratio for application in all commercial cases. Rather, the Tenth Circuit determined, based on the facts before it, that $6,000,000 is the maximum constitutionally permissible punitive damage award, taking into account the numerous factors this Court set forth in *BMW*. There is nothing certworthy about such a determination.

In essence, CTR asks this Court to review the decision of the Tenth Circuit because CTR asserts that the conditional remittitur of the punitive damage award to $6,000,000 is, itself, somehow unconstitutional. That is a very bold request, given that even the remitted punitive damage award is the largest such award ever affirmed by any federal or state court under Oklahoma law, and is still 22 times the compensatory damage award. Punitive damages are, of course, "a windfall to a fully compensated plaintiff." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981). Petitioners' attempt to maximize the punitive award in this case presents no issue for this Court's review.

ARGUMENT

I. The Tenth Circuit's Decision Applying *BMW* Does Not Conflict With *Gasperini*

CTR argues that the Tenth Circuit contravened *Gasperini* by failing to show appropriate deference to the jury's $30,000,000 punitive damage award. *Gasperini*, however, is irrelevant to the question that was before the Tenth Circuit. *Gasperini* addressed a Seventh Amendment challenge to federal appellate court review of district court decisions regarding state law excessiveness of compensatory damage awards. The Court held that such review does *not* violate the Seventh Amendment, and established that abuse of discretion is the appropriate standard of review in such cases. 116 S. Ct. at 2224-25. The excessiveness question in *Gasperini*-type cases is whether the compensatory award comports with the evidence of harm to the plaintiff presented to the jury, that is, whether the jury correctly calculated actual damages.

The present case, and *BMW*, by sharp contrast, involve constitutional review of punitive damage awards. The excessiveness question in these cases is whether the punitive damage award comports with constitutional requirements of fair notice and a rational relationship to the state's legitimate interests in punishment and deterrence. *See BMW*, 116 S. Ct. at 1595 (punitive award "grossly excessive" in relation to state's legitimate interests in punishment and deterrence "enter[s] the zone of arbitrariness that violates the Due Process Clause"). As the Tenth Circuit explained, this inquiry requires a legal determination; the jury was never asked to resolve this constitutional question and so there can be no issue of reexamining the jury's factfinding under the Seventh Amendment. Pet. App. at 20a ("In the case before us . . . we would not be redetermining a fact issue found by a jury. We ascertain no error . . . in the jury's fact-finding. Rather we have concluded, aided by the intervening *BMW*

case, that the jury's punitive damages award was so excessive it violated the substantive element of the Due Process Clause of the Federal Constitution. This is a federal constitutional issue.").

CTR argues that the determination of a punitive damages award is a question of "fact" for the jury. Pet. at 12-13. Even assuming *arguendo* that the *jury's* assessment of punitive damages under state law is a question of "fact," however, appellate review to determine whether the amount of punitive damages violates the federal Constitution involves an altogether different process. The jury's finding of "fact" may be in accord with state law standards, but, as *BMW* demonstrates, the reviewing court must still determine whether the result is constitutional. There is no reexamination of fact found by a jury in that determination.

This Court repeatedly has emphasized the constitutional requirement of searching appellate review in punitive damage cases. Because "[p]unitive damages pose an acute danger of arbitrary deprivation of property," *Honda Motor Co. v. Oberg,* 114 S. Ct. 2331, 2340 (1994), procedural due process requires especially rigorous appellate scrutiny of punitive damage awards to protect against arbitrary and extreme punishments. Thus, in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), the Court upheld the Alabama punitive damage system in large part because it perceived that system to mandate independent, objective appellate review of punitive damage awards pursuant to "detailed substantive standards." *Id.* at 20-21. In *Honda,* the Court held that due process mandates post-verdict judicial review, explaining that both *Haslip* and *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), emphasized "the procedural component of the Due Process Clause," particularly stressing meaningful appellate review as a procedural protection. 114 S. Ct. at 2335. And, in *BMW,* the Court not only announced new federal standards to

determine whether a punitive damage award violates the Constitution, it applied those standards itself to strike down the award as excessive, without deferring to the Alabama courts' and jury's findings. If CTR were correct that searching appellate constitutional review of punitive damages violates the Seventh Amendment, this Court would have been guilty of such a violation in *BMW* itself, handed down only one month before *Gasperini*.[2] That proposition is obviously wrong. The Tenth Circuit's application of *BMW* to this case certainly produced no constitutional violation and presents no issue worthy of this Court's review.[3]

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[2] The Seventh Amendment applies when this Court reviews the verdict of a state jury. *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 n.26 (1964).

[3] CTR alleges a split of authority among the federal courts of appeals on the proper application of *Gasperini*, Pet. at 10-11, but this case does not implicate any such disagreement. This case involves constitutional review, to which *Gasperini* does not speak. None of the cases comprising CTR's purported split involved constitutional determinations. *See Steinke v. Beach Bungee, Inc.*, 105 F.3d 192 (4th Cir. 1997) (state law excessiveness of compensatory award); *Outboard Marine Corp. v. Babcock Indus., Inc.*, 106 F.3d 182 (7th Cir. 1997) (state law additur of compensatory award); *Consorti v. Armstrong World Indus., Inc.*, 103 F.3d 2 (2d Cir. 1995) (state law excessiveness of compensatory award); *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568 (8th Cir. 1997) (state law excessiveness of punitive damage award); *Mejias-Quiros v. Maxxam Property Corp.*, ___ F.3d ___, No. 96-1691, 1997 WL 104057 (1st Cir. March 13, 1997) (same); *Lee v. Edwards*, 101 F.3d 805 (2d Cir. 1996) (excessiveness of punitive damage award under federal common law).

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Moreover, appellate scrutiny of this punitive damage award did not infringe the relationship between the trial court and the court of appeals, and did not require the Tenth Circuit to remand the case to the trial court before it could determine the constitutional question of excessiveness.[4] The determination that a punitive damage award is

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Moreover, all the cases CTR cites in which courts have applied *Gasperini* have involved compensatory damages under state law. *See Steinke*; *Outboard Marine*; *Consorti*. No appellate court has applied *Gasperini* to limit its authority to review a punitive damage award, much less to do so when the issue involves a federal constitutional determination.

The present Tenth Circuit decision is the only reported post-*Gasperini* case in which a court of appeal has explicitly ruled on the constitutional excessiveness of a jury verdict for punitive damages. *Cf. Cooper v. Casey*, 97 F.3d 914, 919-20 (7th Cir. 1996) (rejecting excessiveness challenge to punitive damage award under 42 U.S.C. § 1983 without stating whether court was conducting constitutional or federal common law review; no reference to standard of review or Seventh Amendment). By definition, there is no split of authority.

[4] When this case was before the Tenth Circuit on remand, CTR did not take the position that the court of appeals should send the case back to the trial court, but rather urged the Tenth Circuit to address the issue of excessiveness on the merits. CTR therefore has waived any argument about the necessity of remand to the trial court. *See Solorio v. United States*, 483 U.S. 435, 451 n.18 (1987); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981).

unconstitutionally excessive involves the application of a constitutional standard, an exercise fully within the capacity of the courts of appeals. CTR argues, Pet. at 9-10, that *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), limits the court of appeals to abuse of discretion review of the district court's decision, but this argument is plainly wrong. The discussion in *Browning-Ferris* related solely to procedures for review of punitive damage awards under state law. *Id.* at 277-80. The Court in that case explicitly declined to make any decision regarding the nature and scope of constitutional review for excessiveness under the Due Process Clause. *Id.* at 276-77, 279-82. The Court defined the scope of constitutional review in later cases such as *BMW, Haslip,* and *Honda,* which do not limit the constitutional excessiveness determination to abuse of discretion review.

II. The Tenth Circuit Properly Conducted the *BMW* Analysis

A. Constitutional Review of Punitive Damage Awards May Encompass Factors Not Considered By the Jury

CTR argues that the Tenth Circuit violated the Seventh Amendment in conducting its constitutional review by considering two affidavits that CTR had placed in the appellate record but that CTR had not submitted to the jury.[5]

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[5] CTR neglects to mention that the affidavits in question were by CTR's own experts, submitted to the trial court by CTR in connection with a summary judgment motion, cited by CTR in its briefs to the Tenth Circuit, and included by CTR in the appellate record. CTR's complaint that it did not

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CTR again confuses the nature of the Tenth Circuit's exercise. The Tenth Circuit, pursuant to a direct mandate from this Court, determined on remand whether the State of Oklahoma constitutionally could impose this extraordinary level of punishment on OXY. The Tenth Circuit did not attempt to assess whether the jury properly considered the evidence before it. *See* Pet. App. at 20a ("We ascertain no error . . . in the jury's fact-finding."). The exercise of constitutional review is of broader scope, encompassing those factors relevant to the state's legitimate interests in punishment and deterrence and to due process considerations of fair notice. *See BMW*, 116 S. Ct. at 1595, 1598. Thus, this Court in *BMW* established as an essential guidepost of such review the consideration of civil and criminal penalties that could be imposed for similar misconduct—facts plainly outside the consideration of the jury. *Id.* at 1603.

BMW also indicated that a reviewing court sometimes should consider the potential injury to the plaintiff in determining whether a punitive damage award violates due process. *Id.* at 1602. The two affidavits at issue in this case go to this question. CTR contends that the Tenth Circuit's reliance on these two affidavits invaded the province of the jury, but the jury in this case made absolutely no determination regarding potential harm; there was no jury instruction on the issue. Indeed, since CTR did not seek instructions or a special verdict on the potential harm issue, the Tenth Circuit, by relying on these affidavits, was giving

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have the opportunity to "cross-examine" its own affiants, Pet. at 23, is at best disingenuous.

CTR the benefit of the doubt.[6] An appellate court's attempt to assess as accurately as possible an element of constitutional review does not reexamine a fact found by the jury when the jury was never asked to make such a finding.

Even if the Tenth Circuit did somehow err in considering the two affidavits at issue here, it is a case-specific error not appropriate for this Court's consideration. The Tenth Circuit announced no rule of law in this regard, and CTR has cited no case from another court of appeals that is contrary to the Tenth Circuit's decision here. Indeed, CTR cites no authority from any court establishing that the Seventh Amendment precludes a court conducting constitutional review from considering matters placed in the record by the complaining party but not presented to the jury. CTR disagrees with the Tenth Circuit's conclusion regarding potential harm;[7] this is not a matter for this Court's attention.

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[6] The only damages actually found by the jury were $269,000 in compensatory damages. The Tenth Circuit's use of these affidavits, in addition to other evidence that CTR does not challenge, resulted in a generous estimate of potential harm that substantially increased that court's determination of the maximum constitutionally allowable punishment. CTR's complaint is that the court did not interpret other alleged evidence to increase its estimate of potential damages even more. Such a claim, arising out of a dispute over the interpretation of specific evidence in a 10,000-page appellate record, hardly presents certworthy issues.

[7] CTR contends that the Tenth Circuit's present conclusion concerning potential harm conflicts with its earlier purported determination that OXY's conduct created $5,000,000 in

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B. The Tenth Circuit Did Not Establish Or Apply a Mandatory Ceiling on the Ratio of Punitive Damages to Actual and Potential Harm, But Engaged in Precisely the Case-Specific Review *BMW* Commands

CTR makes two contradictory arguments regarding the Tenth Circuit's discussion of the ratio of punitive damages to actual and potential harm. CTR argues first that the Tenth Circuit erred in *not applying* a supposed 10 to 1 maximum ratio, Pet. at 23-25, and then contends that the court erred in *establishing* a 10 to 1 ratio as a "bright line" test. *Id.* at 25-27. Both of these arguments are wrong, and neither provides a reason for granting certiorari.

If 10 to 1 were truly a "bright line," the Tenth Circuit presumably would have applied that rule on remand, and been done with the matter. But that is not what the Tenth Circuit did. Instead, the Tenth Circuit followed all aspects of this Court's analysis in *BMW*. The *BMW* Court explained that "we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential

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potential harm. Pet. at 18. Setting aside that the Tenth Circuit's alleged inconsistency is irrelevant to the question whether this Court should grant review, CTR's argument is based on the misrepresentation of a single footnote in the prior opinion. *See* Pet. App. at 46a-47a, n.15. The statement in the Tenth Circuit's prior opinion that CTR relies upon was *not* a finding of that court, but rather a characterization of the trial court's finding regarding profit incentive, which the Tenth Circuit unanimously found to be "incorrect or misapplied." *Id.* at 46a.

damages to the punitive award." 116 S. Ct. at 1602. The ratio is simply one of several elements the reviewing court should consider. The Tenth Circuit, contrary to CTR's argument, considered numerous factors, including whether OXY had fair notice of the size of this punitive award and the nature of the conduct for which it could be punished, Pet. App. at 8a-9a, the nature of OXY's alleged misconduct and the purely economic nature of the alleged injury, *id.* at 9a-12a,[8] the ratio of punitive damages to actual and potential harm and to OXY's actual and potential profit, *id.* at 13a-15a, civil and criminal penalties for similar misconduct, *id.* at 15a-16a, and OXY's financial status (a factor not mentioned in *BMW*, and one that increased the level of the punitive award here). *Id.* at 17a-18a.[9] Upon review of all these

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[8] In *BMW*, the Court cited the distinction between economic injury and harm to health and safety as a relevant factor in evaluating the reprehensibility of punishable conduct. 116 S. Ct. at 1599. The Tenth Circuit, which had rejected this distinction when OXY urged it in its initial appeal, Pet. App. at 50a, recognized its significance in the decision on remand. *Id.* at 10a.

[9] CTR argues that the Tenth Circuit "refused to consider OXY's expected gain" in reviewing the punitive damage award. Pet. at 27. This is incorrect. The Tenth Circuit concluded expressly that "the total *actual and potential profit* had OXY succeeded would be near $2,000,000." Pet. App. at 14a-15a (emphasis added). The court then used this figure in noting that the remitted $6,000,000 punitive award was "about three times our calculation of actual and potential damages." *Id.* at 21a.

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factors, the Tenth Circuit concluded that "$30,000,000 exceeds the constitutional limit." *Id.* at 19a. Acknowledging that determination of the allowable amount of punitive damages is a "difficult decision," the court nonetheless used its "best judgment [to] determine that $6,000,000 is the maximum constitutionally permissible punitive damages award justified by the facts of this case." *Id.* at 21a. The Tenth Circuit then explained that the approved award was between three and six times CTR's actual and potential damages—ratios that it found to be within constitutional acceptability under these particular facts. *Id.* The Tenth Circuit engaged in a fact-specific application of the entire *BMW* analysis; it did not establish or apply any "bright line" ratio.

Indeed, while CTR incorrectly accuses the Tenth Circuit of relying "solely" on the ratio guidepost, Pet. at 5, 23, CTR actually wants to elevate the ratio above all other considerations. CTR argues that the Tenth Circuit was somehow compelled to affirm a punitive award of at least ten times the actual and potential damages in this case, regardless of the other *BMW* factors. *See* Pet. at 23-25. The rule CTR asserts here would contravene *BMW*'s admonition against overreliance on a mathematical formula.

CTR's argument that the Tenth Circuit established a 10 to 1 ceiling contradicts the plain language of the Tenth

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CTR contends also that the Tenth Circuit was required to consider the potential harm to others. The *BMW* decision does not support this conclusion, as the Tenth Circuit explained. Pet. App. at 13a. Moreover, CTR fails to cite a case from any other court of appeals that conflicts with the Tenth Circuit's reading of *BMW*.

Circuit's decision. The court explicitly recognized that the *BMW* "guidelines . . . contain no absolutes." Pet. App. at 21a. Based upon this Court's discussion of ratio in *BMW* and *TXO*, the Tenth Circuit "*surmise[d]*" that "in *economic injury* cases if the damages are significant and the injury not hard to detect, the ratio of punitive damages to the harm *generally* cannot exceed a ten to one ratio." Pet. App. at 13a (emphasis added). This is hardly a "bright line" test. The Tenth Circuit simply determined that "in this [economic injury] case," the ratio of the $30,000,000 punitive award to the actual and potential harm to CTR was too large. *Id.* at 19a. That determination contravenes no decision of this Court or of any other court of appeals, and is not appropriate for this Court's review.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for writ of certiorari.

April 25, 1997

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In The Supreme Court of the United States
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CONTINENTAL TREND RESOURCES, INC., et al.,
Petitioners,
v.

OXY USA INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for The Tenth Circuit

REPLY BRIEF

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REPLY BRIEF

Respondent OXY USA Inc.'s ("OXY") Brief in Opposition concedes that the Tenth Circuit Majority Opinion ("Majority Opinion") employed a *de novo* review of the jury verdict relying on evidence outside the record without any deference to the jury verdict or the district court's findings. In their Petition for Certiorari, Petitioners Continental Trend Resources, Inc., *et al.*[1] ("CTR") demonstrated that this extraordinary procedure represented a dramatic departure from established appellate practice and directly conflicts with this Court's decisions in *Gasperini v. Center of Humanities, Inc.*, 116 S.Ct. 2211 (1996) ("*Gasperini*"), *BMW of North America, Inc. v. Gore*, 116 S.Ct. 1589 (1996) ("*BMW*") and *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) ("*BFI*"). The issue left open in *Honda Motor Co. v. Oberg*, 512 U.S. 415, 114 S.Ct. 2331 (1994) ("*Oberg*") of "what standard of review is constitutionally required" for appellate review of punitive damage awards challenged on constitutional grounds is ripe for review by this Court.

OXY implicitly acknowledges that *Gasperini* would prohibit the Majority's *de novo* venture. OXY, however, dismisses *Gasperini* as "irrelevant". Instead, OXY urges the Court to accept the proposition that there is a chameleon-like standard of review by federal appellate courts which changes color from abuse of discretion to *de novo* whenever a party incants a claim of constitutional deprivation due to an alleged "grossly excessive" verdict. By this reply, CTR will show

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[1] The other Petitioners are Harold G. Hamm, Trustee of the Harold G. Hamm Revocable Inter Vivos Trust; Gary H. Wright, Cindy Wright, Jeffrey B. Hume, and Farrar Oil Company.

that *Gasperini* is not only relevant but controlling. Certiorari should be granted to resolve this issue of critical importance.

I. CERTIORARI SHOULD BE GRANTED TO DECIDE THE ISSUE OF THE PROPER STANDARD OF REVIEW IN A PUNITIVE DAMAGE DIVERSITY CASE

The calculation of the appropriate amount of punitive damages has traditionally been left to the unique discretion of the factfinder. Whether judge or jury, the factfinder is in the best position to determine the amount of a punitive damage award because "the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case." *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371, 14 L.Ed. 181 (1851). Historically, in reviewing the constitutionality of an award of punitive damages, a court could not explicitly or implicitly recalculate the award of damages nor express an opinion whether the award was too high or too low. This is because of the time-honored rule that a court may not substitute its judgment for that of the jury. *See Tennant v. Peoria & Pekin Union Ry.*, 321 U.S. 29, 35 (1944); *Rasmussen Drilling, Inc. v. Kerr-McGee Nuclear Corp.*, 571 F.2d 1144, 1149 (10th Cir.), *cert. denied*, 439 U.S. 862 (1978). "'If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.'" *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 17 (1991) ("*Haslip*") (citations omitted).

Gasperini reaffirmed the notion that in a federal court diversity case, the Seventh Amendment prohibits a court of appeals from redetermining a fact issue decided by a jury and that the review standard for damage awards was abuse of discretion. 116 S.Ct. at 2223-24. *BMW* did not change the

settled federal abuse of discretion standard of review nor create a vehicle for expansive *de novo* appellate review of punitive damage awards. Instead, it created a narrow channel for appellate review in which the focus of the reviewing court is to ensure that "under the circumstances of the case in question, the award of punitive damages is not grossly excessive." 116 S.Ct. at 1595.

OXY attempts to skirt the holding of *Gasperini* by arguing that it is "irrelevant to the question that was before the Tenth Circuit" because this case involves punitive damages, not compensatory damages. (OXY Response, p. 4.) OXY is wrong. The Tenth Circuit recognized the relevance of *Gasperini*. Pet. App. at 19a-20a. More importantly, this Court has held that "the question whether an award of *compensatory* damages exceeds what is permitted by law is not materially different from the question whether an award of *punitive* damages exceeds what is permitted by law." (Emphasis in original.) *Gasperini*, 116 S.Ct. at 2223 n.18; *see also* 116 S.Ct. 2221 n.12. In *Oberg*, the Court found that there was no historical basis for suggesting "that different standards of judicial review were applied for punitive and compensatory damages before the twentieth century." 512 U.S. 415, 423 n.2, 114 S.Ct. 2331, 2336.[2]

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[2] In its Petition, CTR also showed that the Majority Opinion conflicts with other circuit courts which employ an abuse of discretion review standard. OXY's attempt to distinguish those cases is unavailing. (OXY Response, pp. 6-7 n.3.) *See, e.g., Steinke v. Beach Bungee*, 105 F.3d 192 (4th Cir. 1997) [*Gasperini* governs motion for remittitur; court of appeals required to apply abuse of discretion standard of review citing punitive damage case of *Defender Indus. v. Northwestern Mutual Life Ins. Co.*, 938 F.2d 503, 507 (4th Cir. 1991) (*en banc*)]; *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568 (8th Cir. 1997) [applying abuse of discretion (continued...)

A punitive damage award is "grossly excessive" only when, in relation to the state's legitimate interests and punishment and deterrence, it "enter[s] the zone of arbitrariness that violates the due process clause." *BMW*, 116 S.Ct. at 1595. OXY's assertion, that this inquiry is a legal determination because "the jury was never asked to resolve this constitutional question and so there can be no issue of reexamining the jury's factfinding on the Seventh Amendment" (OXY Response, p. 4), is disingenuous. A court cannot determine whether the punitive damage award is "grossly excessive" in relation to the state's legitimate interests and punishment and deterrence unless the court first reviews the factual record upon which the punitive damage verdict was predicated. The touchstone of constitutionality under *BMW* and its predecessors is not the amount of the award in the abstract. Instead, it is a determination of whether the award is "reasonable" by application of the guideposts to a discrete factual record. By necessity, a court can only determine whether an award is grossly excessive by a review of the facts upon which the award was based. If OXY's position is accepted, much of the Court's discussion in *BMW* identifying the type of facts and conduct associated with particularly reprehensible conduct is superfluous. The *BMW* Court specifically rejected a mechanistic legal bright line approach for judicial review. 116 S.Ct. at 1604.

A review of this Court's recent punitive damages decisions show the flaw in the Majority's *de novo* journey

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2 (...continued)
standard where "Wal-Mart contends that the amount of the award 'shocks the conscience' because it is ... so excessive it violates the Fourteenth Amendment" (citing *BMW*)]. *See also Neibel v. Trans World Airline*, 108 F.3d 1123 (9th Cir. 1997).

and why certiorari should be granted. In *BMW*, the Court first observed that the Alabama Supreme Court "properly" eschewed reliance on evidence not in the record, *BMW*, 116 S.Ct. at 1598, and focused on facts in the record accepting "of course, the jury's finding" on those facts. Contrary to OXY's depiction of *BMW*, the Court afforded deference to both the Alabama Supreme Court and the jury's findings and left the "appropriate remedy" to the "state court in the first instance." *Id.* at 1604. Justice Breyer, joined by Justices O'Connor and Souter, wrote separately to emphasize that "[m]embers of this Court have generally thought, however, that if 'fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption of validity'" (citation omitted), and that it was "important to explain why this presumption of validity is overcome in this instance." *See BMW*, 116 S.Ct. at 1604.

In *Oberg*, the Court recognized that "[t]his case does not pose the more difficult question of what standard of review is constitutionally required. Although courts adopting a more deferential approach use different verbal formulations, there may not be much practical difference between review which focuses on 'passion and prejudice', 'gross excessiveness' or whether the verdict was 'against the great weight of the evidence.' All of these may be rough equivalents of the standard this Court articulated in *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (whether 'no rational trier of fact could have' reached the same verdict)." 512 U.S. at 432 n.10, 114 S.Ct. at 2341 n.10.

TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993) ("*TXO*") instructed that "[t]he jury verdict in respondent's favor ... makes it appropriate to accept respondent's version of disputed issues of fact," 509 U.S. at

447, and that "[a]ssuming that fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption of validity. Indeed, there are persuasive reasons for suggesting that the presumption should be irrebuttable, (citation omitted), or virtually so, (citation omitted)." 509 U.S. at 457. The Court likewise emphasized the deferential nature of an excessiveness review. *See also BFI, supra.*

The Majority Opinion also contradicts the *Gasperini* and *BFI* mandate that the primary responsibility for an excessiveness review is lodged in the district court in the first instance.[3] *See, e.g., VF Corp. v. Wrexham Aviation Corp.*, 686 A.2d 647 (Md. App. 1996) (because a post-verdict review by trial judge is required to validate punitive damage award, *BMW* guideposts should first be applied by the trial court). The right to jury trial is too precious to permit the standard of review to become a moving target and the responsibilities of the district court or the courts of appeal to be blurred, depending on the type of error asserted. (*See* OXY Response, p. 8.) The application of *de novo* standard of review is not only wrong, it is clearly contradicted by this Court's extant case law. Certiorari should be granted.

An equally serious violation of the Seventh Amendment occurred when the Tenth Circuit relied on evidence outside the record.[4] In its Petition, CTR provided cases and

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[3] OXY wrongly suggests that CTR waived its argument that the Majority erroneously applied *Gasperini*. Unlike OXY, CTR identified the relevancy of *Gasperini* and its application to this case in its Brief on Remand (*see* Brief, pp. 3-5; Pet. App. 19a-20a.)

[4] OXY grossly misrepresents the affidavits in question. The (continued...)

explained why consideration of evidence outside the record by a federal appellate court violates the Seventh Amendment. (*See* Petition, pp. 18-23.) *See also Ford v. Guarantee Abstract & Title Co.*, 553 P.2d 254, 276-77 (Kan. 1976) (court violated the Seventh Amendment by basing remittitur on matters outside of the record). OXY's *ipse dixit* argument, that the jury made no determination regarding potential harm and therefore consideration of the subject affidavits was harmless, is folly. Both the district court and the Tenth Circuit's prior decision found that the jury had ample evidence of potential harm to support the verdict and that such evidence was expressly urged by counsel for CTR as a basis to impose punitive damages. *See, e.g.*, Pet. App. 79a-81a.

OXY also weakly asserts that the Tenth Circuit's error was a "case specific error not appropriate for this Court's consideration" (OXY Response, p. 10), urging that there is no case contrary to the Tenth Circuit's decision. This Court itself, however, has rejected the idea that a reviewing court may rely on matters outside the evidence heard by the jury. In *BFI*, *Haslip*, *TXO* and *BMW*, the Court focused solely on

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[4] (...continued)
affidavits were not mentioned by either party throughout this lengthy process as a basis for either affirming or reversing the jury's verdict. The district court did not consider the affidavits as part of the record in its lengthy opinion denying OXY's motion for new trial and specifically rejected OXY's attempts to inject matters outside the record. (Pet. App. 859.) The Tenth Circuit did not mention, much less consider, the affidavits in first affirming the judgment in its entirety. CTR was never given notice that the Tenth Circuit would consider evidence outside the record nor was CTR given the opportunity to discuss the relevance (or lack thereof) of the affidavits to the jury's findings. At bottom, the affidavits were submitted for a different purpose, on different issues, and had nothing to do with the voluminous evidence that was introduced before the jury of OXY's actual and potential harm and profit.

the evidence presented to the jury in reaching its decision. As Justice Kennedy has explained, "it is commonplace that a jury verdict must be reviewed in relation to the record before it.... [A] jury is bound to consider only the evidence presented to it in arriving at a judgment." *TXO*, 509 U.S. at 468. OXY makes no attempt to distinguish these cases nor the other conflicting authority cited in the Petition. More telling is that OXY has failed to cite a single decision -- state or federal -- which would permit an appellate court to consider matters never presented to the jury in determining an issue of remittitur. CTR previously demonstrated that the Tenth Circuit's *de novo* factfinding journey into and outside the record has had a profound impact on this case and will have an even more profound and undesirable result on other cases. Certiorari should be granted to resolve these important issues.

II. THE MAJORITY APPLIED A MATHEMATICAL CAP OF 10 TO 1 AND VIOLATED THE SEVENTH AMENDMENT BY REFUSING TO REMIT THE VERDICT TO THE MAXIMUM CONSTITUTIONALLY PERMITTED AMOUNT

CTR and OXY simply disagree whether the Majority Opinion held that there was a maximum "10 to 1 ratio in commercially injury cases [where] the damages are significant and the injury not hard to detect." The dissenting judge certainly read the Majority's decision as capping punitive damages in economic injury cases at a 10 to 1 ratio. Pet. App. 24a. OXY, of course, does not dispute the point that such a holding squarely conflicts with this Court's decision in *BMW*, *TXO* and *Haslip*.

In its Petition, CTR also argued that the Majority Opinion violated the Seventh Amendment by refusing to remit the judgment to the maximum constitutional amount. OXY confuses CTR's argument by suggesting that CTR "actually wants to elevate the ratio above all other considerations."[5] (OXY Response, p. 13.) OXY's attempt to deflect CTR's Seventh Amendment argument is unpersuasive.

CTR cited several federal appellate decisions holding that remittitur to the highest amount the jury could have properly awarded is required to comply with the Seventh Amendment.[6] (*See* Petition, pp. 23-25.) These decisions create a direct conflict with the Majority's decision here to remit it to the least amount the jury could have awarded. OXY makes no attempt to distinguish these cases. The Tenth Circuit's holding presents a direct conflict with this Court's prior opinions and the Seventh Amendment of the Constitution. Certiorari should be granted.

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[5] OXY wrongly asserts that *BMW* does not support the conclusion that potential harm to others is a relevant consideration in the constitutional calculus. In its Petition, CTR explained the relevance of the consideration and the impact its exclusion had on this case. *See* Petition, pp. 27-30.

[6] Historically, it was typical practice to grant a remittitur to the maximum amount that a reasonable jury could have awarded. *See Guerry v. Kerton*, 31 S.C.L. (2 Rich.) 507, 512 (S.C. 1846) (granting remittitur to "the highest verdict, according to the evidence, that the jury could have given"); *Diblin v. Murphy*, 3 Sand. 19, 21 (N.Y. Super. Ct. 1849) ("reducing the verdict to an amount, such as if the jury had found it as the damages, we would not interfere with their conclusion...."); *Dimick v. Schiedt*, 293 U.S. 474, 480-81 (1935).

CONCLUSION

For the reasons stated in its Petition and in this Reply, CTR requests the Court to grant certiorari and set this case for plenary review.

Respectfully submitted,

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